United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

360

No. 17,353

SHERIDAN L. McGARRY,

Appellant,

v.

STEWART L. UDALL, Secretary of the Department of Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

Whether the United States District Court for the District of Columbia erred:

1. In holding that a conflicting lease offer, which was premature when filed, could be revived by subsequent events so as to deprive this appellant of his statutory right as the first qualified applicant for an oil and gas lease;

2. In failing to recognize and hold that the appellee Secretary of Interior made a ruling which was arbitrary and capricious in denying this appellant an oil and gas lease;

3. In failing to find and hold that this appellant was and is legally qualified for and entitled to an oil and gas lease.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF CASE	2
ARGUMENT:	
Point 1. The Lower Court Erred in Holding that a Conflicting Lease Offer, Which Was Premature When Filed, Could Be Revived by Subsequent Events so as To Deprive this Appellant of His Statutory Right as the First Qualified Applicant for an Oil and Gas Lease	3
Point 2. The Lower Court Erred in Failing to Recognize and Hold that the Appellee Secretary of the Interior Made a Ruling Which Was Arbitrary and Capricious in Denying this Appellant an Oil and Gas Lease	8
Point 3. The Lower Court Erred in Failing to Find and Hold that this Appellant Was and is Legally Qualified for and Entitled to an Oil and Gas Lease	10
CONCLUSION	10

TABLE OF CASES

McKay v. Wahalenmaier, 226 Fed. 2d 35, 96 U.S. App. D.C. 313 (1955)	10

DEPARTMENT OF INTERIOR DECISIONS

Belco Petroleum Corporation, Charles Getzler, A-29131, March 2, 1962, 69 I.D. 3	5, 8, 9
Clem Daneau, A-28309, June 14, 1960	8
Duncan Miller, A-28041, 66 I.D. 342, September 23, 1959	9
Franco Western Oil Company, et al., A-27607, 65 I.D. 316, August 11, 1958	5, 6

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BRIEF FOR APPELLANT

OPINION BELOW

The District Court wrote an opinion in the action below.

JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Columbia entered September 4, 1962, denying plaintiff's and granting defendant's motions for a summary judgment (J.A. 42). The Notice of Appeal was filed September 14, 1962 (J.A. 42). The jurisdiction of the District Court was invoked under Title 11, Section 306 of the District of Columbia Code and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Sec. 1009; and upon the ground that the the construction and interpretation of federal statutes and regulations were required. The defendant's (appellee's) official residence is in the District of Columbia. The value of the property in controversy exceeded the prescribed limit of the court's jurisdiction. This Court has jurisdiction under 28 U.S.C. Sec. 1291.

STATEMENT OF CASE

This action was brought by appellant against the appellee Secretary to establish the appellant's statutory right to an oil and gas lease under the Mineral Leasing Laws. Both parties filed statements of material facts, as to which there was no genuine issue, and sought summary judgment.

Although there is no dispute as to the facts, a firm grasp of their import in chronological order is essential to an analysis of the legal issues involved. Appellant, therefore, briefly states the same as follows:

On September 24, 1959, American Petrofina Company of Texas, a corporation not concerned in the present action, held an outstanding and subsisting United States Oil & Gas Lease covering certain public domain lands in the State of Utah. On that date said corporation made a partial assignment of the said lease to an individual, who is also not a party to and who is not concerned in this action, and filed the partial assignment in the Salt Lake City Land Office. The normal expiration date of the said lease in the absence of said assignment or other extension thereof was October 31, 1959.

No administrative action was taken formally upon the partial assignment until November 10, 1959, and on that date the Manager of the Salt Lake City Land Office rendered his decision which provided: "Partial Assignment Approved . . . . Leases . . . . are automatically extended . . . . to and including 9/30/61". Theretofore, at 10:00 A.M. on Monday, November 2, 1959, Mrs. Sue C. Graham had filed a lease offer for the land in question and her lease offer was held to be paramount to appellant's lease offer by the Secretary's ruling here complained of and by decision of the Trial Court here appealed from. On November 19, 1959, the Manager of the Salt Lake City Land Office having noted that the lease rentals for the lease year beginning November 1st were unpaid, rendered a decision which purported to vacate the decision of November 10, 1959, and which stated that "Assignment of Lease. . . . null and void, as lease expired by operation of law 10/31/59". The appellant's lease offer was filed on November 20, 1959.

ARGUMENT

Point 1. The Lower Court Erred in Holding That a Conflicting Lease Offer, Which Was Premature When Filed, Could Be Revived by Subsequent Events so as To Deprive This Appellant of His Statutory Right as the First Qualified Applicant for an Oil and Gas Lease.

The fundamental error of the reasoning of the defendant Secretary which was adopted by the trial court can be demonstrated briefly. That reasoning is simply that the partial assignment was ultimately not approved, and hence, was never effective and that therefore Mrs. Graham's offer was the first offer and was entitled to a statutory priority and that the appellant's offer was the second offer and conferred no rights. This reasoning attempts to compress into one time interval all of the events concerned. This failure to note the time difference in the events in contrary to the undisputed facts and leads to an incorrect conclusion in derogation of the statutory rights of this appellant. Such statutory rights are

not matters to be determined by the appellee Secretary. In the administration of the public lands, the provisions of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended, 30 U.S.C. 226, require that the Secretary of the Interior shall issue an oil and gas lease to the first qualified applicant therefor.

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended, 30 U.S.C. Sec. 226, states in part as follows:

> "All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior.
>
> . . . . When the lands to be leased are not within any known geologic structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding . . . . "

It is not expressly stated in the statute that an offer which is premature in that it is filed during the existence of a previous valid lease confers no right, but that has been the long established policy and construction by the Department of the Interior. Duncan Miller, July 20, 1961, A-28647 (Office of the Secretary of the Interior); Stephen P. Dillon, et al., 66 I.D. 148 (1959); Duncan Miller, September 1, 1961, A-29012 (Office of the Secretary of Interior); Carolyn C. Stockmeyer, January 30, 1962, A-28756 (Office of the Secretary of the Interior).

Nor did the appellee Secretary have any discretion as to whether or not he should approve the partial assignment. It is provided by Section 30(a) of the Mineral Leasing Act as enacted August 8, 1946, 60 Stat. 950, 30 U.S.C. (1958 ed.) Sec. 187a with certain qualifications and exceptions not material here, that:

> ". . . the Secretary shall disapprove the assignment or sublease only for lack of qualifications of the assignee or for lack of sufficient bond." 30 U.S.C. 187a.

Nor has the defendant Secretary any discretion in a determination of when the assignment might take effect. Section 30 (a) of the Mineral

Leasing Act as amended August 8, 1946, 60 Stat. 950, 30 U.S.C. (1958 ed.) Sec. 187a, provides in part that:

> ". . . . any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office. . . ."

The fact that the lease later expired for non-payment of rental was no valid or lawful reason to deny approval of the assignment. As was well stated in a footnote to the decision in Belco Petroleum Corporation, Charles Getzler, A-29131, March 2, 1962, 69 I.D. 3, which decision was written for the Secretary by the same Deputy Solicitor who a month previously had written the decision here complained of:

> "3/ In any event, these assignments were timely filed and ought to have been approved effective May 1, 1961, for the fact that, absent some reasons for extending them, they would have expired a month later on May 31, 1961, is no reason for refusing approval to an otherwise valid assignment."

In fact, the Secretary's regulations specifically provide in the disjunctive that the assignment will be approved either if the lease is in good standing when the assignment and any necessary bond are filed, or is placed in good standing before the assignment is reached for action (43 C.F.R. 192.141 (3)(f)). In the instant case the lease account was in good standing at the time the partial assignment was filed and that fact is legally controlling.

Nor do administrative delays or other circumstances change the end result fixed by statute. In Franco Western Oil Company, et al., A-27607, 65 I.D. 316, August 11, 1958, the Solicitor stated for the Secretary:

> ". . . , nevertheless the assignment, if it is approved, takes effect on a day certain. The approval of the assignment may be given during the month in which the assignment is filed, ... , or the approval may be delayed for months as happens in many cases due to various circumstances.

> However, regardless of when approval is given, the assignment, when approved, is effective from the first day of the lease month following the date of filing thereof. The Secretary (or his delegate) cannot, by approving an assignment in the month in which it is filed, change the effective date of the assignment. The first day of the lease month following the filing of an assignment is the earliest date upon which the assignment can take effect." (Emphasis supplied)

Confronted with this decision in the Franco Western Oil Company case, the Acting Director of the Bureau of Land Management requested clarification of the departmental decision of August 11,1958, insofar as that decision may affect noncompetitive oil and gas leases extended under an interpretation of Section 30 (a) of the Mineral Leasing Act, as amended by the Act of July 29, 1954 (30 U.S.C. 1952 ed., Supp. V, Section 187a), which interpretation was overruled in the decision of August 11, 1958. Pursuant to that request, the acting Solicitor rendered a supplemental decision, Franco Western Oil Company, et al., A-27607 (Supp.) 65 I.D. 427, September 30, 1958, in which he stated:

> "The decision of August 11, 1958, represents what the department now believes to be the correct interpretation of the law."

It is inescapable that the denial of the approval of the assignment was erroneous and unlawful. It is equally true that neither the assignor nor the proposed assignee did not appeal from this erroneous action, but on the contrary consented and acquiesced in the denial. The defendant Secretary and the trial court would relate the denial and the consent and acquiescence therein to a date prior to the filing of Mrs. Graham's competing lease offer. It is manifest, however, that the validity of an offer for an oil and gas lease under the Mineral Leasing Act must be determined as of the time that offer is filed. The statute in requiring, as it does, the issuance of a non-competitive oil and gas lease to the first qualified applicant cannot be construed to allow an applicant to become the first and qualified by virtue of subsequent events.

All sorts of collusion and unlawful advantage could be obtained if the surrendering of legal rights to a lease or an extension thereof could be made retroactively so as to validate an offer made before those rights were surrendered.

If a leaseholder is given the option to continue his lease by rental payment during a period of a single day or to make (or to cause to be made through a nominee) an offer for a new lease which will be valid if rental is not paid, the resulting mischief is obvious. The statutory purpose to provide equal opportunity for every qualified applicant to become the first to file would be frustrated. The previous lease might be perpetuated by the expedient of new leases, competition being eliminated by the simple fact that no one not privy to the decision would have an opportunity to know that the rental was not going to be paid on the due day. Consideration might be demanded for the deliberate foregoing of the rental payment on that day.

It is, therefore, necessary in order to reach a correct conclusion herein to examine closely the situation at the time Mrs. Graham's competing lease offer was filed. At that time an assignment had been filed which had the effect of extending the prior lease for a period of two years. Denial of the approval of that assignment could not lawfully have been ordered. At the time Mrs. Graham filed her lease offer at 10:00 a.m., there existed an undeniable legal right to pay the lease rental during all the remainder of that same day, the first day of the month having been a Sunday. (30 U.S.C.A. 188) Neither the assignor's nor the assignee's position became clear until the end of the day on November 2nd. <u>That day belonged to them</u>. They could pay the rent due at any time prior to the closing of the land office at 3:00 p.m. No third party could therefore make a legally valid move on that day.

Eight days later, the assignment was actually approved by action of the proper Land Office and the previous lease declared to be extended. Neither at the date of filing of Mrs. Graham's competing offer nor during

the ensuing days while the assignment was declared approved could there have been any question whatsoever but that her competing lease offer was without any right whatsoever. No one then could safely have predicted that the Land Office would subsequently erroneously revoke its approval of the assignment, or that the parties involved would acquiesce therein. The competing offer having been invalid and premature when filed could not thereafter be validated by subsequent events. Since the prior offer was demonstrably premature, the appellant's statutory right to the lease as the first qualified applicant must be honored.

Point 2. The lower court erred in failing to recognize and hold that the appellee Secretary of the Interior made a ruling which was arbitrary and capricious in denying this appellant an oil and gas lease.

The appellee Secretary in his previous decisions has recognized the results which should have followed in the matter here at issue. Here he is arbitrary and capricious and entirely inconsistent with his previous valid interpretations and decisions. Appellee Secretary and the trial court both relied heavily upon the Secretary's decision in Clem Daneau, A-28309, June 14, 1960. The question in that case was whether a pending partial assignment would, without more, prevent further leasing. Appellee Secretary has answered that question in the negative. Since the assignment in that case was defective for want of filing a sufficient bond, appellant concedes that this interpretation is within the power of the appellee Secretary as an administrative determination. However, the question here at issue is not whether the pending partial assignment prevented further leasing after the expiration of the previous lease, but rather whether on the date the competing lease offer of Mrs. Graham was filed the previous lease had or had not expired.

In point is the Secretary's decision in Belco Petroleum Corporation, Charles Getzler, supra. In that case the partial assignment involved was filed on May 1, 1961, that month of May being the 12th month of the

last year of the lease term. Defendant Secretary in his decision in that case recognized that the request for approval of the partial assignment must be filed no later than the last day of the 11th month of the last year of a lease term, and held that, since the last day of the lease was a Sunday, the assignments were properly and timely filed and should have been approved and the leases extended. In the Belco case, the appellee Secretary quoted previous decisions, announcing the rule to be that the provision for extension after a Sunday was to be applied liberally and leniently in the absence of some clear indication to the contrary. To fail to give effect to the mandatory provisions of the statute allowing a rental payment on the day following a Sunday by the previous leaseholders, as was done in the case at bar, is entirely arbitrary and capricious and without justification or right.

In the case of Belco, supra, the Secretary, citing Duncan Miller, A-28041, 66 I.D. 342, September 23, 1959, concluded, "Thus, it was the clear intent of the Department and Congress that a leasee has the whole of the anniversary date of the lease while the Land Office is open for business within which he may pay his advance rental and prevent the automatic termination of his lease, and, until the anniversary date is passed, the lease is not terminated. . . . " Therefore, in the Miller case, since the prior lease had as its anniversary date November 1, Miller could have paid the rental at any time during that day while the Land Office was open for business, and since this was so the lease remained in effect until the end of November 1, 1955. Consequently, at the time Miller filed his lease offer at 2:30 p.m. on that date, the previous lease was still in effect. The Secretary thus held that "An offer for an oil and gas lease is properly rejected when the lands applied for are included in an existing lease." The quoted language applies entirely to the case under consideration. The distinction contended for by the Secretary is that a subsequent legally unjustifiable disapproval of a partial assignment destroyed the effect of the statutory one-day extension. That may well be as to the parties to the previous lease, but such erroneous subsequent action could

not have been anticipated at the time of Mrs. Graham's competing lease offer and to honor and validate her premature offer is, therefore, entirely arbitrary and capricious.

Point 3. The lower court erred in failing to find and hold that this appellant was and is legally qualified for and entitled to an oil and gas lease.

No substantial reason has been advanced why appellant is not entitled to a lease if it is determined that the Graham offer is premature. Brief attention, however, should perhaps be given to a theory not adopted by the trial court, but urged by the appellee Secretary in the court below. It was there strongly contended that, because of the failure of the Department to cause a notation upon its tract books of the termination of the previous lease by non-payment of rental, appellant could not obtain a new lease until that notation was made under the applicable regulations (43 C.F.R. 1958 Supp. Sec. 192.161). This argument points up the Secretary's fundamental error in continuing to ignore the respective times of the two lease offers. At the time of the filing of appellant's lease offer, the erroneous revoking decision had already been rendered. The assignment had been declared void and the prior lease had reverted to a status of expiration at the end of its stated term and there was no question of termination for failure to make rental payment, or of the consequent alleged necessity of record notation by reason thereof. The situation, as has been shown, was materially different when Mrs. Graham's competing offer was filed.

CONCLUSION

This Court had previous occasions to enforce the statutory right to an oil and gas lease of the first qualified applicant. As for example in McKay v. Wahalenmaier, 226 Fed. 2d 35, 96 U.S. Appeals D.C. 313 (1955). In other cases this Court has sustained the discretionary power of the

Secretary in certain cases. But here, there is no question of discretion and there is no question of an advantage to the government in sustaining Mrs. Graham's competing offer. Either Mrs. Graham or the appellant will be bound by the same lease terms and will pay the same rental, in the absence of production, with the same royalty if production is encountered. No reason exists why this Court should not enforce the appellant's statutory right to an oil and gas lease. The decision of the trial court should be reversed.

Respectfully submitted,

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INDEX

	Page
Docket Entries	1
Complaint for Review, for Declaratory Judgment and for Injunctive Relief, Filed Aptil 18, 1962	2
Exhibit B -- Decision, dated March 16, 1960	8
Exhibit F -- Decision, dated November 23, 1960	10
Exhibit H -- Decision, dated May 6, 1962	15
Plaintiff's Motion for Summary Judgment, Filed May 16, 1962	19
Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment	19
Answer of the Defendant, Filed June 21, 1962	27
Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, Filed June 29, 1962	29
Defendant's Statement of Material Facts as to Which There is No Genuine Issue, Filed June 29, 1962	34
Defendant's Motion for Summary Judgment, Filed July 13, 1962	35
Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, Filed July 13, 1962	36
Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Cross-Motion for Summary Judgment, Filed July 18, 1962	36
Memorandum Opinion, Filed August 14, 1962	37
Judgment, Filed September 4, 1962	42
Notice of Appeal, Filed September 14, 1962	42

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIDAN L. McGARRY 1102 Walker Bank Building Salt Lake City, Utah Plaintiff, v. STEWART L. UDALL, SECRETARY OF THE DEPARTMENT OF THE INTERIOR Washington, D.C. Defendant.	)	Civil Action No. 1262-'62

DOCKET ENTRIES

Date	Proceedings
1962	
Apr. 18	Complaint, appearance Exhibits A thrugh H; filed.
Apr. 18	Summons, copies (3) and copies (3) of Complaint issued ser. 4-19-62; U.S. Atty. ser. 4-18-62; Atty. Gen. ser 4-19-62.
May 16	Motion of pltff. for summary judgment; P & A; statement of facts; c/m 5-16-62; M.C. 5-16-62; filed.
May 25	Stipulation of counsel extending time for deft. to oppose motion of pltff. for summary judgment until June 18, 1962. (M/N); filed.
Jun. 21	Stipulation extending time for deft. to respond to complaint and to motion for summary judgment to and including 6/22/62; filed.
Jun. 21	Answer of deft. to complaint; c/m 6/20/62; appearance of Ralph S. Boyd; filed.
Jun. 21	Calendared (AC/N)
Jun. 25	Motion of pltff. for default judgment; P&A; c/m 6/25/62; MC 6/25/62; filed.
Jun. 29	Memorandum of deft. in opposition to motion for default judgment; c/m 6/28/62; statement; P&A; c/m 6/28/62;filed

Date	Proceedings
1962	
Jul. 13	Motion of deft. for summary judgment; P&A; Statement; c/m 7/13/62; MC 7/13/62; filed.
Jul. 18	Memorandum of P&A by pltff. in opposition to defts. cross-motion for summary judgment; c/m 7/18/62; filed.
Jul. 31	Motions of pltff. and deft. for summary judgment argued and taken under advisement. (Rep. Sanche); Tamm, J.
Aug. 14	Memorandum Opinion. (N); Tamm, J.
Sep. 4	Order denying pltffs. motion for summary judgment; granting defts. motion for summary judgment and dismissing action with prejudice. (N); Tamm, J.
Sep. 14	Notice of appeal by pltff. from order of 9/4/62; copy to Ralph S. Boyd, Esq., Dept. of Justice. Deposit $5.00 by Speidel; filed.
Sep. 14	Cost bond on appeal in sum of $250.00 with Glens Falls Ins. Co., approved; filed.

[Filed April 18, 1962]

COMPLAINT FOR REVIEW, FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

Sheridan L. McGarry brings this action against the defendant named above and for his complaint alleges as follows:

1. Jurisdiction of this Court is invoked under Title II, Section 306 of the District of Columbia Code, upon grounds that the defendant's official residence is the District of Columbia, and upon the additional ground that the construction and interpretation of Federal statutes and regulations thereunder are required. Jurisdiction is further invoked under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1009). The property here involved is real property, the value of which, exclusive of interest and costs, exceeds $3,000.00.

2. Plaintiff seeks relief under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009). Relief is further sought under the terms

of the Declaratory Judgment Act (28 U.S.C. Sections 2201 and 2202).

3. This is an action for a declaratory judgment and for appropriate injunctive relief for the purpose of determining an actual controversy of a justiciable nature between the parties hereto, which controversy may be determined by a judgment of this court.

4. This is a suit to review a final decision of the Secretary of the Interior, which action visited a legal wrong upon the plaintiff. All administrative remedies available to plaintiff have heretofore been exhausted.

5. The pertinent facts of this controversy, which are a matter of administrative record, are as follows:

A. American Petrofina Company of Texas was the Lessee of record of United States Oil and Gas Lease Salt Lake 067828, covering Lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, NW 1/4 SW 1/4, Sec. 25, T. 25 S., R. 21 E., S.L.M., Grand County, Utah, which lease was issued effective November 1, 1949, and subsequently extended for 5 years from November 1, 1954. On September 24, 1959, the lessee filed a partial assignment executed September 15, 1959, covering the SW 1/4 SW 1/4 of Sec. 25, T. 25 S., R. 21 E., S.L.M.

B. At 10:00 o'clock A.M., November 2, 1959, Mrs. Sue C. Graham filed a lease offer covering the following described lands situated in Grand County, Utah, to-wit:

T. 25 S., R. 21 E., S.L.M.

Section 25: All (Lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, W 1/2 SW 1/4)

T. 26 S., R. 21 E., S.L.M.

Section 15: Lot 2;

Section 21: Lots 3, 5.

Mrs. Sue C. Graham's lease offer, which was given serial number Utah - 038493, was the only offer that included the lands in Section 25 described above, while the remaining lands in her offer were covered by other simultaneous offers upon which there was a drawing held and in

which her offer was drawn as number 11.

C. On November 10, 1959, the Manager of the Salt Lake City Land Officer rendered a formal decision approving the partial assignment filed September 24, 1959, which decision was entered on the serial page as follows:

> "Partial assignment approved from American Petro-fina Company of Texas to E. Sidney Hughes of the following lands: SW 1/4 SW 1/4 Sec. 25 effective 10/1/59. Given serial SL 067828-A. Leases SL 067828 and LW 067828-A are automatically extended under Reg. 43 CFR 192.144(b) for two (2) years from effective date of partial assignment, or to and including 9/30/61."

D. On November 19, 1959, the Manager rendered a formal decision vacating the approval of the subject partial assignment, which decision was entered on the serial page as follows:

> "Decision of 11/10/59 vacated. Assignment of lease SL 067828-A null and void, as lease expired by operation of law 10/31/59."

E. At 10:00 o'clock A.M., November 20, 1959, Sheridan L. McGarry, Plaintiff herein, filed his lease offer covering all of Section 25, T. 25 S., R. 21 E., S.L.M., Grand County, Utah, and was assigned serial number Utah-038802.

F. On February 23rd, 1960, Sheridan L. McGarry, the Plaintiff herein, filed his formal written protest against Mrs. Sue C. Graham's lease offer Utah-038493, a copy of which is attached hereto as Exhibit "A".

G. By decision dated March 16, 1960, the Manager of the Salt Lake City Land Office issued a decision with respect to serial number Utah-038493, which states in part as follows:

> "Offer to lease Utah 038493 is hereby rejected as to all (lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, W 1/2 SW 1/4) of Sec. 25, T. 25 S., R. 21 E., S.L. Mer., Utah, as

these lands were embraced in oil and gas lease Salt Lake 067828 at the time offer to lease Utah 038493 was filed. Lease Salt Lake 067828 segregated the lands from further application by reason of an allowable application for assignment which, when approved would extend the lease under 43 CFR 192.144(b). Said lease remained in effect until the cancellation of the assignment and lease were noted on the serial register on November 19, 1959. Whether a lease is void, voidable, or valid, the lands covered thereby are not available for further leasing until cancellation. The rule applies equally to leases which may have been improperly extended. See Hjalmer A. Jacobsen, et al., 61 I.D. 116 (1953) Cf. Richard P. De Smet, et al., A-27837 (October 29, 1958.)"

A copy of said decision is attached hereto as Exhibit "B".

H. Mrs. Sue C. Graham then filed her "Notice of Appeal", which was dated April 5, 1960, and a copy of which is attached hereto as Exhibit "C".

I. A statement of reasons dated April 25, 1960, was filed by Mrs. Sue C. Graham in which she appealed from the Manager's decision dated March 16, 1960, a copy of which is attached hereto as Exhibit "D".

J. The Plaintiff herein then filed a Response to Appeal of Mrs. Sue C. Graham, a copy of which is attached hereto as Exhibit "E".

K. The Director under date November 23, 1960, reversed the Manager's decision, holding the lease to have terminated because of the expiration of the term fixed by the contract of the parties regardless of the fact that the statute (30 U.S.C. 188) clearly allowed rental payment the day the competing offer here was filed. A copy of said decision is here attached as Exhibit "F".

L. Plaintiff duly appealed the decision of the Director above mentioned to the Secretary of the Interior and filed his statement of reasons and brief in support thereof, which raised and fully presented any matters and issued involved in this civil action. A copy of said brief is attached hereto as Exhibit "G".

M. Under date of January 26, 1962, the Deputy Solicitor, acting pursuant to authority delegated by the Secretary of the Interior, affirmed the Director's decision above mentioned, which decision is attached hereto as Exhibit "H", saying in part:

> "Subsequently, the land office discovered that the lease rentals for the first year of the extended terms due on November 1, 1959, had not been paid. . . ." (Emphasis supplied)

The decision in this sub-paragraph mentioned is cited as A-28759.

6. The decision rendered on behalf of the Secretary mentioned in the preceding sub-paragraph is erroneous, contrary to law, in violation of the statutory and constitutional rights of the plaintiff, and should be corrected and reversed by a judgment of this court for the following reasons:

A. The Defendant Secretary acted directly contrary to a specific, valid and mandatory statutory requirement that:

> ". . . The Secretary shall disapprove the assignment or sub-lease only for lack of qualifications of the assignee or for lack of sufficient bond." 30 U S.C. 187a. (Exceptions follow which have no application whatsoever here).

B. The Defendant Secretary acted directly contrary to a valid general regulation promulgated by his predecessor proving that:

> "Unless the lease account is in good standing as to the area covered by the assignment when the assignment and bonds are filed, or is placed in good standing before the assignment is reached for action the lease will be cancelled as provided in paragraph 192.161." 43 CFR 192.141(3)(f).

It is unquestioned the lease account here involved was in good standing at the time the assignment in question was filed.

C. The Defendant acted directly contrary to a specific and valid statutory provision and a general regulation promulgated by his predecessor (30 U.S. 188, 43 CFR 192.171) in considering the rental due date here material to have been November 1st, 1959, when in truth and fact the statutory due date was November 2nd, 1959, by reason of the

circumstance that the first mentioned date was a Sunday. Defendant under the general regulations promulgated by his predecessor (43 CFR 200) was bound to take notice of the circumstance that the date in question was a Sunday and in addition, that fact was by the Plaintiff brought to the attention of Defendant's subordinates who participated in the decision which is the subject of this action.

D. By reason of the Defendant's actions mentioned above which are illegal and erroneous as is above stated, this Plaintiff has been deprived of his right provided by statute for a United States Oil and Gas Lease covering the lands in question.

7. The Plaintiff has at no time relinquished his rights under lease offer Utah 038802, and has not accepted any refund of advance rentals and filing fees paid by him. He, therefore, retains his status as prior qualified offeror, and the lands applied for are open lands subject to oil and gas lease.

8. Section 17 of the Mineral Leasing Act requires the Secretary of the Interior to issue an oil and gas lease to the first qualified applicant therefor if a lease is to be issued. Plaintiff's qualifications as an applicant remain undisputed, and he has complied with all necessary conditions precedent to the issuance of a lease.

WHEREFORE, the Plaintiff prays:

1. That this Court declare that the oil and gas lease offer of Sue C. Graham, Utah-038493, was ineffectual as prematurely filed and conferred no rights.

2. That this Court order that the Decision of January 26, 1962, described herein under Paragraph 5 M. be vacated.

3. That this Court order the Defendant to recognize and protect the statutory right of the Plaintiff and to issue an oil and gas lease pursuant to lease offer Utah 038802.

4. That the Court grant such other and further relief as may be proper in the premises.

DATED this 16th day of April, 1962.

/s/ Sheridan L. McGarry
Plaintiff pro se

/s/ Richard Henry Speidel
* * *
Attorney for Plaintiff

[Filed April 18, 1962)

EXHIBIT B

Land Office
Post Office Box No. 777
Salt Lake City 10, Utah

March 16, 1960

Certified Mail
Return Receipt Requested

DECISION

Mrs. Sue C. Graham P.O. Box 172 Salt Lake City 10, Utah	: : :	Utah 038493 Oil and Gas

Offer to Lease Rejected in Part
Offer to Lease Suspended in Part

Reference is made to your offer to lease Utah 038493, filed on November 2, 1959, covering all of Sec. 25, T. 25 S., R. 21 E.; and lot 2 of Sec. 15, lots 3 and 5 of Sec. 21, T. 26 S., R. 21 E., Salt Lake Meridian, Utah.

Offer to lease Utah 038493 is hereby rejected as to all (lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, W 1/2 SW 1/4) of Sec. 25, T. 25 S., R. 21 E., S.L. Mer., Utah, as these lands were embraced in oil and gas lease Salt Lake 067828 at the time offer to lease Utah 038493 was filed.

EXHIBIT B (cont'd.)

Lease Salt Lake 067828 segregated the lands from further application by reason of an allowable application for assignment which, when approved would extend the lease under 43 CFR 192.144(b). Said lease remained in effect until the cancellation of the assignment and lease were noted on the serial register on November 19, 1959. Whether a lease is void, voidable, or valid, the lands covered thereby are not available for further leasing until cancellation. The rule applies equally to leases which may have been improperly extended. See Hjalmer A. Jacobsen, et al., 61 I.D. 116 (1953). Cf. Richard P. DeSmet, et al., A-27837 (October 29, 1958).

A new offer, under serial No. Utah 038802, has been filed embracing these lands.

Offer to lease Utah 038493 is hereby suspended on lot 2 of Sec. 15, and lots 3 and 5 of Sec. 21, T. 26 S., R. 21 E., S.L. Mer., Utah.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, (1) there must be strict compliance with the regulation in 43 CFR Part 221 (see enclosed Form 4-1364), and (2) the adverse party to be served is:

Sheridan L. McGarry, 1102 Walker Bank Building, Salt Lake City, Utah, offeror of offer to lease Utah 038802.

/s/ Ernest E. House
Manager

* * *

[Filed April 18, 1962]

EXHIBIT F

OIL AND GAS * 4 Assignments
* 5 Cancellation
*10 Lease Offers

Where a Manager approved a partial assignment subsequent to the anniversary date of the 11th year of a lease (the record indicating that rental due on that date had not been paid and that the lease expired by operation of law at the end of its extended five-year term), his action was erroneous and ineffective.

The first qualified offeror for land available for oil and gas leasing has a statutory perference right to a lease, if a lease is to be issued for the land, which must be honored.

Sue C. Graham, Utah 038493 (November 23, 1960)

In reply refer to:
Utah 038493
038802
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

November 23, 1960

Certified Mail
Return Receipt Requested

DECISION

Sue C. Graham : Oil and Gas

Manager's Decision Reversed
Case Remanded

Mrs. Sue C. Graham has appealed from a decision of the Manager, Salt Lake City Land Office, dated March 16, 1960, which rejected her oil and gas lease offer Utah 038493 filed November 2, 1959 under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1958 ed., sec. 226) as to all of sec. 25 (Lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, W 1/2 SW 1/4) T. 25 S., R. 21 E., S.L.M., Utah, for the reason that the lands were embraced in oil and gas lease Salt Lake 067828 at the time her offer was filed. The decision stated that Salt Lake 067828 segregated the lands from further application by reason

of an allowable application for assignment which, when approved, would extend the lease under 43 CFR 192.144(b); that said lease remained in effect until the cancellation of the assignment and lease was noted on the serial register on November 19, 1959; that whether a lease is void, voidable, or valid, the lands covered thereby are not available for further leasing until cancellation.

In her appeal, Mrs. Graham contends that oil and gas lease Salt Lake 067828 was not extended but expired by operation of law at the end of its tenth year, or on October 31, 1959, and that the lands thereafter became available immediately for the filing of new lease offers.

The records show that oil and gas lease Salt Lake 067828 was issued for a primary term of five years, effective November 1, 1949, under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1952 ed., sec. 226). The lease was extended for five years at the end of its primary term, from November 1, 1954, and was made subject to the automatic termination provisions of the amendatory leasing act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188). A partial assignment, executed September 15, 1959, was filed for approval on September 24, 1959, and approved November 10, 1959, effective October 1, 1959. The decision approving the assignment designated the assigned portion of the lease as Salt Lake 067828-A and stated that, pursuant to regulation 43 CFR 192.144(b), both leases Salt Lake 067828 and Salt Lake 067828-A will be extended for a period of two years from the effective date of the assignment, or to and including September 30, 1961. The decision dated November 10, 1959, approving the partial assignment, was vacated by the Manager's decision, dated November 19, 1959, which declared the assignment to be null and void since the eleventh-year rentals were not received in the Land Office and held the lease to have expired October 31, 1959. Notation of the action taken on Salt Lake 067828 was not made on the serial register of the Land Office until November 19, 1959, at which time the Land Office considered the lands immediately thereafter available for leasing. An oil and gas lease offer Salt Lake 038802 was filed by Sheridan L. McGarry on November 20, 1959.

EXHIBIT F (cont'd.)

Mr. McGarry filed a reply brief to the appellant's appeal stating that the appellant's offer was prematurely filed because the lease anniversary date under Salt Lake 067828 was November 1, 1959, which was a Sunday, and, since the Land Office was closed on that day the lessee had until November 2, 1959, in which to pay the 11th year rentals, which also was the date appellant's offer was filed; consequently, the offer was prematurely filed and created no rights in the appellant, citing Duncan Miller, A-28041 (September 23, 1959). Furthermore, Mr. McGarry states that the termination of Salt Lake 067828 was not noted on the tract books in the Land Office until after the appellant's offer was filed.

The question presented by this appeal is whether or not the lands in lease Salt Lake 067828 were open for new lease offers on November 2, 1959, when the appellant's offer was filed. We hold that these lands were open for new lease offers on that date and therefore the Manager's decision rejecting the appellant's offer as to the land involved in this appeal case was erroneous.

The Manager held in part that the pendency of the partial assignment on the expiration date of the extended term of the lease had the effect of segregating the lands in Salt Lake 067828 from further lease offers until final action on the assignment was taken. However, the Department has held that in the absence of a regulation providing that such a pending partial assignment shall have this effect, the lands in an oil and gas lease become available for further leasing immediately on the expiration of its extended term unless there is a regulation providing otherwise.[1/] Clem Daneau, A-28309 (June 14, 1960).

1/ Effective January 7, 1960, 43 CFR, 1958 Supp., 192.43 was amended to provide that lands in cancelled or relinquished leases or leases that terminate by operation of law shall become available for further leasing on the fifth working day after the third Monday in each month when a list of cancelled, relinquished or expired leases is posted on a bulletin board in each Land Office. Circular No. 2032. 24 F.R. 9846, December 8, 1959.

Consequently, under the regulations in effect at the times material to this appeal, the pendency of the partial assignment at the expiration date of the five year extended term of lease Salt Lake 067828 did not segregate the leased lands from the filing of new lease offers.

There remains for consideration that part of the Manager's decision holding that the approval of the partial assignment on November 10, 1959, effective October 1, 1959, and the extension of both leases for two years from the latter date served to segregate the land and prevent the initiation of rights in the land while the extensions were outstanding irrespective of whether they were void. The Manager was extending to this case the well-established rule that an erroneous extension of an oil and gas lease by a competent official who has jurisdiction over the lease requires the rejection of all subsequent conflicting offers filed before the cancellation of the erroneously extended lease is noted in the tract book. See Duncan Miller, Louise Cuccia, 66 I.D. 388, 391-2 (1959). However, this rule is not applicable to a situation where at the time a lease offer is filed the Manager had not extended the lease. Cf. W. W. Priest, A-28319 (June 28, 1960). On November 2, 1959, when the appellant's offer was filed the lands involved were covered only by an application for partial assignment, not by an outstanding lease. The Department was bound to accept her lease offer filed on that date and suspend action upon it until final action was taken on the application for partial assignment on November 10, 1959. Her lease offer could have been rejected on November 10, 1959, by the Manager but she would have lost her rights under this offer only if the allowance of the application for partial assignment and the extension of leases Salt Lake 067828 and 067828-A the Manager purported to grant on that date were proper. Since they were not proper, the appellant's lease offer cannot be rejected for the reason assigned in the Manager's decision.

As to Mr. McGarry's argument that the appellant's offer was prematurely filed on November 2, 1959, it is sufficient to state that lease Salt Lake 067828 did not terminate by forfeiture under the automatic

EXHIBIT F (cont'd.)

termination provisions of the act of July 29, 1954, which amended section 31 of the Mineral Leasing Act (see 30 U.S.C., 1958 ed., sec. 188), for failure of the lessee to pay the lease rental on or before the anniversary date of the lease in order to continue the lease for another year within its term. Rather this lease expired by operation of law because of the expiration of the term of the lease fixed by the contract of the parties.

When lands are made available for noncompetitive leasing, the Department is required by statute to issue the lease to the first qualified applicant therefor. C.T. Hegwer et al., 62 I.D. 77 (1955). In the instant case the appellant appears to be the first qualified applicant for the land involved in this appeal. Therefore, the Manager's decision of March 16, 1960, insofar as it rejected her offer for the land in question is reversed. . .

Mr. McGarry is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

When this decision becomes final the case records will be returned to the Land Office through the Bureau's State Supervisor, Salt Lake City, Utah, for further action in accordance with this decision.

If an appeal is taken by Mr. McGarry, then the adverse party to be served is:

Mrs. Sue C. Graham
P.O. Box 172
Salt Lake City, Utah

/s/ Edward Woozley
Director

* * *

[Filed April 18, 1962]

EXHIBIT H

SHERIDAN L. McGARRY

A-28759 Decided January 26, 1962

Oil and Gas Leases: Lands Subject to -- Oil and Gas Leases: Assignments

The pendency at the expiration date of an oil and gas lease of a partial assignment of the lease, which upon approval would extend the term of the segregated leases, does not make the land unavailable for the filing of offers after the expiration of the lease.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D.C.

[Seal]

A-28759

Sheridan L. McGarry : Utah 038802, 028493.
: Noncompetitive oil and gas
: offer held senior offer.
: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Sheridan L. McGarry has appealed to the Secretary of the Interior from a decision dated November 23, 1960, by which the Director of the Bureau of Land Management reversed a decision of the land office at Salt Lake City, dated March 16, 1960, partially rejecting the noncompetitive oil and gas lease offer of Mrs. Sue C. Graham filed November 2, 1959, under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The record shows that a portion of the land covered by Mrs. Graham's offer was earlier included in a 5-year lease, Utah 067828, issued on November 1, 1949, and extended for an additional five years through October 31, 1959. The lease was extended subject to the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188), which provides for automatic termination of a lease for failure to pay the annual rental on or before the anniversary date of the lease. A partial assignment of lease Utah 067828 was filed in the land office on September 24, 1959. The

EXHIBIT H (cont'd.)

assignment was approved by the land office on November 10, 1959, effective October 1, 1959. The approval document stated that the base lease and a new A lease containing the assigned portion of the original lease were automatically extended, under departmental regulation 43 CFR 192.144(b), for a period of two years from the effective date of the partial assignment to and including September 30, 1961. Subsequently, the land office discovered that the lease rentals for the first year of the extended terms due on November 1, 1959, had not been paid and on November 19, 1959, vacated its approval of the assignment and declared the assignment null and void. There was no appeal from this decision. The following day, November 20, 1959, McGarry filed an offer for the land included in the prior lease and in Mrs. Graham's offer filed on November 2, 1959. On March 16, 1960, the land office rejected Mrs. Graham's offer in part on the ground that an allowable application for assignment segregated the land from further application sothat it was not available for leasing under the Mineral Leasing Act when her offer was filed.

Mrs. Graham appealed and the Director reversed, holding that the pendency of an application for approval of a partial assignment on the expiration date of an oil and gas lease does not segregate the land so that it is unavailable for further leasing unless there is a regulation which so provides, citing Clem Daneau, A-28309 (June 14, 1960). He pointed out that an erroneous extension of an oil and gas lease by a competent official who has jurisdiction over the lease makes it unavailable for leasing so that subsequent offers filed before cancellation of the erroneously extended lease is noted in the tract book must be rejected, citing Duncan Miller et al., 66 I.D. 388 (1959). But he denied that this rule has any application to an offer to lease filed before the previous lease has been extended. He then concluded that the previous lease expired of its own limitation before the land office acted on the application for approval of the assignment and that Mrs. Graham's offer was entitled to favorable consideration after it became apparent that the action purporting to approve the assignment was improper.

McGarry contends on appeal that the land in question was covered by subsisting oil and gas leases at the time when Mrs. Graham filed her offer and that, even if this were not so, her offer was invalid.

I believe that the Director's conclusion was correct. At the time when Mrs. Graham filed her offer there was simply pending a partial assignment of a lease which, in the absence of approval of the assignment, would have expired on October 31, 1959. In Clem Daneau, supra, the Department held that the mere pendency of a partial assignment at the expiration of the fixed term of a lease does not segregate the land from filing and that the land becomes available for filing after expiration of the lease. That decision applies here.

McGarry seeks to distinguish the Daneau case by saying that the assignment in that case was defective because it was not accompanied by the consent of the surety on the lease bond, whereas here the assignment was proper. A reading of the Daneau decision shows that it was not based upon any defect in the assignment there considered and that the factors upon which the decision was based are equally applicable here.

Despite McGarry's contentions, the fact is that there were no subsisting leases in existence when the Graham offer was filed. It is true that upon subsequent approval of the assignment the effective date would have related back to October 1, 1959, and the segregated leases would have been extended for two years from that date. But it cannot be said that before the assignment was approved it was effective to create leases which were outstanding on November 2, 1959.

It is also true that upon approval of the assignment the normal procedure would have been to reject Mrs. Graham's offer. However, the rejection of the offer would have been for the reason that the land

EXHIBIT H (cont'd.)

had been, in effect, leased to a prior applicant, not for the reason that the land was unavailable for filing when Mrs. Graham filed her offer.

In this case, before any action was taken on the Graham offer following approval of the assignment on November 10, 1959, the land office vacated its decision on November 19, and declared the assignment null and void. There being no appeal from the decision of November 19, the effect of the decision was to wipe out the action taken on November 10. Thus the situation was as though the first and only action taken on the assignment was to disapprove it on November 19. This removed any obstacle to considering on its merits the Graham offer.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the Director's decision is affirmed.

/s/ Edward W. Fisher
Deputy Solicitor

[Filed May 16, 1962]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves the Court to enter summary judgment for the plaintiff, and in support of said action, the plaintiff refers the Court to the pleadings and exhibits on file herein, all in accordance with the Rules of Civil Procedure.

The grounds of said motion are that there is no genuine issue as to any material fact and the plaintiff is entitled to the judgment as a matter of law.

A Memorandum of Points and Authorities is attached hereto, in accordance with the Rules of this Court.

DATED this 16th day of May, 1962.

Respectfully submitted,

/s/ Sheridan L. McGarry
Plaintiff Pro se

/s/ Richard Henry Speidel
* * *
Attorney for Plaintiff

[Filed May 16, 1962]

1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action was brought under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, and under the Declaratory Judgment Act, 28 U.S.C. 2201, 2202. Plaintiff contends that defendant has refused to comply with a plain statutory duty in denying to plaintiff an oil and gas lease pursuant to the terms of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 226 (1958 ed.)

STATEMENT OF FACTS

A five-year noncompetitive oil and gas lease covering 557.31 acres

of public land in the State of Utah was issued effective November 1, 1949, pursuant to the terms of Section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. 226 (1958 ed.), and by mesne assignments American Petrofina Company of Texas became the Lessee of record. This lease was extended for five years from November 1, 1954. On September 24, 1959, during the eleventh month of the tenth year of the lease term, as extended, American Petrofina made a partial assignment of 40 acres of the leased land to E. Sidney Hughes. This assignment was approved on November 10, 1959, to become effective October 1, 1959. (Note that the ten-year period of the original lease ordinarily would have expired on October 31, 1959). Under a 1954 amendment to the Mineral Leasing Act, the effect of a valid partial assignment is to extend both the base lease and the assigned portion for two years from October 1, 1959. Franco Western Oil Company, et al, A-27601, August 11, 1958. At 10:00 a.m. on November 2, 1959, Mrs. Sue C. Graham filed an offer to lease the entire 557.31 acres, and other lands not pertaining hereto. On November 19, 1959, the Manager rendered a formal decision vacating the approval of the partial assignment filed on the 24th day of September, 1959, by American Petrofina to E. Sidney Hughes, which decision was entered on the serial page as follows:

"Decision of 11/10/59 vacated. Assignment of SL 067828-A null and void, as lease expired by operation of law 10/31/59."

On the next day at 10:00 o'clock a.m., November 20, 1959, plaintiff herein, filed his lease offer covering all of the acreage here contested.

By decision dated March 16, 1960, the Manager rejected Mrs. Sue C. Graham's lease offer for the following reasons:

"Offer to lease Utah 038493 is hereby rejected as to all (lots 1, 2, 3, 4, 5, 6, 7, W 1/2 E 1/2, E 1/2 W 1/2, W 1/2 SW 1/4) of Sec. 25, T. 25 S., R. 21 E., S.L. Mer., Utah, as these lands were embraced in oil and gas lease Salt Lake 067828 at the time offer to lease Utah 038493 was filed.

Lease Salt Lake 067828 segregated the lands from further application by reason of an allowable application for assignment which,

when approved would extend the lease under 43 CFR 192.144(b). Said lease remained in effect until the cancellation of the assignment and lease were noted on the serial register on November 19, 1959. Whether a lease is void, voidable, or valid, the lands covered
3 thereby are not available for further leasing until cancellation. The rule applies equally to leases which may have been improperly extended. See Hjalmer A. Jacobsen, et al., 61 I.D. 116 (1953) Cf. Richard P. DeSmet, et al., A-27837 (October 29, 1958)."

A copy of the Manager's decision rejecting Mrs. Sue C. Graham's application is attached to the complaint as Exhibit "B".

The Director under date of November 23, 1960, reversed the Manager's decision, holding the lease to have terminated because of the expiration of the term fixed by the contract of the parties, regardless of the fact that the Statute (30 U.S.C. 188) clearly allowed rental payment on the day the competing offer was filed. A copy of the Director's decision reversing the decision of the Manager is attached to the complaint as Exhibit "F".

Plaintiff appealed the Director's decision to the Secretary of the Interior, which appeal raised and fully presented all matters and issues involved in this action. A copy of the brief on said appeal is attached to the complaint as Exhibit "G".

Under date of January 26, 1962, the Deputy Solicitor, affirmed the Director's decision and contended that at the time Mrs. Graham filed her offer there was simply pending a partial assignment of a lease which, in the absence of approval of the assignment, would have expired on October 31, 1959. A copy of the Secretary's decision affirming the Director's decision is attached to the complaint as Exhibit "H".

This suit was instituted on April 18, 1962, and plaintiff now offers the following argument in support of his Motion for Summary Judgment.

ARGUMENT

I

Any Administrative Ruling Out of Harmony With the Statute is a Nullity.

American Petrofina timely filed a partial assignment on September 24, 1959, during the eleventh month of the tenth year of the lease term as extended. In the case of Franco Western Oil Company, et al., A-27601, August 11th, 1958, the Solicitor held in part:

4 "Section 30(a) provides that assignments may be made 'Subject to final approval by the Secretary' and that an assignment 'Shall take effect as of the first day of the lease month following the date of the assignment' in the proper land office."

The subject partial assignment was subsequently approved by a formal decision of the Manager of the Bureau of Land Management and noted on the records November 10, 1959, wherein the Manager held:

"Partial assignment approved from American Petrofina Company of Texas to E. Sidney Hughes of the following lands: SW 1/4 SW 1/4 Sec. 25 effective 10/1/59. Given serial SL 067828-A. Leases SL 067828 and SL 067828-A are automatically extended under Reg. 43 CFR 192.144(b) for two (2) years from effective date of partial assignment, or to and including 9/30/61."

In the decision by the Deputy Solicitor under date of January 26, 1962, he stated:

"Subsequently, the land office discovered that the lease rentals for the first year of the extended term due on November 1, 1959, had not been paid. . ." (Emphasis supplied)

As stated by the Solicitor, the land office discovered the rental was not paid and the Manager subsequently rendered a decision on November 19, 1959, as follows:

"Decision of 11/10/59 vacated. Assignment of lease SL 067828-A null and void, as lease expired by operation of law 10/31/59."

It is here contended that the Secretary acted directly contrary to a specific, valid and mandatory statutory requirement that:

". . .The Secretary shall disapprove the assignment or sublease only for lack of qualifications of the assignee or for lack of sufficient bond." 30 U.S.C. 187a.

It is, therefore, clear that the subject partial assignment was valid and proper and the Statute required the Secretary to approve the same and which restored the anniversary date of November 1st. In this connection, it should be noted that the approval of a partial assignment has the effect of extending the base lease and the assigned protion, but does not change the anniversary date or rental payment date of either of the two separate leases created. In an opinion to the Director of the Bureau of Land Management, M-36464, August 8, 1957, the Associate Solicitor said:

". . .No purpose to change the anniversary date of the lease is evident. The general rule (so far as I know it has never been departed from) is to consider in such cases, and there are several counterparts including those resulting from the operation of section 39 of the Act (30 U.S.C. sec. 209) and section 6 of the Outer Continental Shelf Lands Act (43 U.S.C. 1952 Ed. Supp. IV, sec. 1335), that the anniversary date does not change, but one period will be less than one year and the rentals will be prorated for that period." (Emphasis supplied)

Since the anniversary date remained unchanged, the statutory provision for termination in the event of the non-payment of the rental allowed payment on as well as before the anniversary date. The Act of July 29, 1954, amended Section 31 of the Mineral Leasing Act to provide:

"Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of

producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: . ."

Of course there has been no contention by any party that the previous lease was ever a producing lease within the meaning of the statute quoted. And since November 1, 1959, was a Sunday the Statute further allowed rental payment to be made on and in fact at any time during the following day, November 2, 1959, while the land office was open for business. The Act above mentioned makes the following further provision:

"Provided, however, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made." (30 U.S. 188)

Therefore, in view of the foregoing discussion, it is clear that Mrs. Sue C. Graham's lease offer filed at 10:00 o'clock a.m. on November 2, 1959 was premature by virtue of Statutory provisions and conferred no rights whatsoever. In fact, her lease offer amounted to no more than a mere "blind" or chance filing.

II

The Secretary's Ruling In Question Is Not Only Contrary To Statute But Is Also Contrary To The Regulations of The Department of The Interior and To The Uniform Practice of The Department of Interior.

43 CFR 192.171 provides in part as follows:

". . .However, if the time for payment falls upon any day in which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely."

43 CFR 200 makes it abundantly clear the the defendant Secretary should have taken official notice of the fact that the date of November 1st, 1959 was a Sunday and in addition that fact was made known to him by the plaintiff.

In fact the same Deputy Solicitor who wrote the decision in question,

a little more than a month later, inserted a footnote to his decision in Belco Petroleum Corporation, March 2, 1962, A-29131, which is quoted as follows:

> "3/ In any event, these assignments were timely filed and ought to have been approved effective May 1, 1961, for the fact that, absent some reasons for extending them, they would have expired a month later on May 31, 1961, is no reason for refusing approval to an otherwise valid assignment."

7 The foregoing statement, which is a correct statement of the result required by the applicable statutes, is also consistent with the regulations and policies of the defendant Secretary. The applicable parts of the regulations provide:

> "Unless the lease account is in good standing as to the area covered by the assignment when the assignment and bond are filed, or is placed in good standing before the assignment is reached for action the lease will be cancelled as provided in Sec. 192.161." (43 CFR 192.141(3)(f)).

Mr. Lewis Edwin Hoffman in his book "Oil and Gas Leasing on Federal Lands", from his long experience with the Bureau of Land Management, states not only the normal practice of the Bureau, but also the result required by the statute and the regulations when he stated:

> ". . .Where rentals become due subsequent to the filing of an assignment of a lease, the assignment will be approved, if otherwise found regular, but payments of rental will be required of the assignee under penalty of cancellation of the lease." (Page 137)

The foregoing established position of the Department of Interior is entirely inconsistent with the position taken by the defendant Secretary which is brought into question in this civil action.

The lease offer of Sue C. Graham which was validated by the defendant Secretary was clearly premature, not only be virtue of statute,

but also by regulations and established policy, and the defendant Secretary does not and cannot recognize premature oil and gas lease offers. This principal is so fundamental that further comment should not be necessary; however, just a few of the numerous departmental decisions on the point that premature filings confer no rights are as follows:

Duncan Miller, July 20, 1961, A-28647

Stephen P. Dillon, et al, 66 I.D. P. 148 (1959)

Duncan Miller, September 1, 1961, A-29012

Carolyn C. Stockmeyer, Jan. 30, 1962, A-28756

III

Plaintiff Was and Is Entitled By Statute To An Oil and Gas Lease

The Plaintiff has at no time relinquished his rights under lease offer Utah 038802, and has not accepted any refund of advance rentals and filing fees paid by him. He, therefore, retains his status as prior qualified offeror, and the defendant Secretary has unquestionably determined that an oil and gas lease will be issued.

Section 17 of the Mineral Leasing Act requires the Secretary of the Interior to issue an oil and gas lease to the first qualified applicant therefor is a lease is to be issued. Plaintiff's qualifications as an applicant remain undisputed, and he has complied with all necessary conditions precedent to the issuance of a lease.

CONCLUSIONS

For the foregoing reasons, the Plaintiff's Motion for Judgment should be granted and the statutory preference right to an oil and gas lease of the Plaintiff should be recognized, and that this Court should declare the lease offer of Sue C. Graham, Utah-038493, ineffectual and the Secretary's decision of January 26, 1962, should be vacated and the defendant should be ordered to issue a lease to the Plaintiff.

Dated this 16th day of May, 1962.

Respectfully submitted,

/s/ Richard Henry Speidel
* * *
Attorney for Plaintiff
[Certificate of Service]

/s/ Sheridan L. McGarry
Plaintiff pro se

[Filed June 21, 1962]

ANSWER OF THE DEFENDANT

First Defense

The complaint fails to state a claim upon which relief can be granted against the defendant.

Second Defense

Mrs. Sue C. Graham is an indispensable party defendant in this action but she has not been joined and cannot be served with process since she is a resident of Salt Lake City, Utah.

Third Defense

1. The defendant admits that his official residence is in the District of Columbia. The defendant is without knowledge or information sufficient to form a belief as to the value of the land for which plaintiff is seeking an oil and gas lease. The defendant is advised and believes that the other allegations in paragraph 1 of the complaint are matters of law which do not require answer and, therefore, those allegations are neither admitted nor denied.

2. The defendant is advised and believes that the allegations in paragraphs 2, 3 and 4 of the complaint are matters of law which do not require answer and, therefore, those allegations are neither admitted nor denied.

3. The defendant admits the allegations in paragraph 5A of the complaint, except that he avers that oil and gas lease Salt Lake 067828, in addition to the lands described in that section of the complaint, also included the SW 1/4 SW1/4 of Sec. 25, T. 25 S., R. 21 E., S.L.M.

The defendant admits the allegations in paragraphs 5B through 5J.

The defendant admits the allegations in paragraph 5K that by decision dated November 23, 1960, the Director reversed the Manager's decision and that a true copy of the Director's decision is annexed to the complaint as Exhibit F.

The defendant admits the allegations in paragraphs 5L and M.

4. The defendant is advised and believes that the allegations in paragraph 6 of the complaint are arguments or conclusions of law which do not require answer and, therefore, those allegations are neither admitted nor denied.

5. The defendant admits that the plaintiff has not relinquished whatever rights he may have had under lease offer Utah 038802 and that the lands described in that application are subject to oil and gas leasing. The defendant denies that plaintiff ever had any "status as prior qualified offeror."

For further answer to paragraph 7 of the complaint, the defendant avers that if oil and gas lease Salt Lake 067828 was terminated by non-payment of rent, then that termination has not yet been noted on the tract book in compliance with the applicable regulation in 43 C.F.R., 1958 Supp., 192.161; 20 F.R. 1778.

6. The defendant is advised and believes that the allegations in the first sentence of paragraph 8 of the complaint are conclusions of law which do not require answer and, therefore, those allegations are neither admitted nor denied. The defendant avers that he has not decided whether plaintiff is qualified to receive and hold the lease which he is seeking since other sufficient reason for rejecting plaintiff's lease offer exists and was the basis for defendant's rejection of plaintiff's lease offer.

WHEREFORE, having fully answered, the defendant prays that the complaint be dismissed.

Respectfully,

/s/ Ralph S. Boyd
Attorney for Defendant

[Certificate of Service]

[Filed June 29, 1962]

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Facts

The essential facts are set forth in full in defendant's statement under Rule 9(h) and will not be repeated here.[1/]

Statute Involved

Section 30(a) of the Mineral Leasing Act of 1920, added by the Act of August 8, 1946, 60 Stat. 950, 955, as amended by the Act of July 29, 1954, 68 Stat. 583, 585, 30 U.S.C. 187a, provided in pertinent part as follows:

> Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under said sections, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof * * *. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereunder accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities

---

1/ It may be noted that plaintiff's motion does not satisfy the requirement of that rule that "In addition to the points and authorities required by part (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue."

2 upon any other segregated portion of the land originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

Regulations Involved

Part 192 of Title 43 of the Code of Federal Regulations sets forth the regulations pertaining to oil and gas leases.

43 C.F.R. §192.40 (1954 ed.) at all times here material provided in pertinent part:

§192.140 Assignments or transfers of leases or interest therein. Leases may be assigned or subleased as to all or part of the leased acreage and as to either a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office of all the papers required by §§192.141 and 192.142. * * *

43 C.F.R. §192.144(1954 ed.) provides:

§192.144 Extension of leases segregated by assignment. Any lease segregated by assignment, including the retained portion, shall continue in effect for the primary term of the original lease, or for two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the original lease, whichever is the longer period.

(b) Undeveloped parts of leases assigned out of leases which are in their extended term under any provision of the act shall continue in effect for two years, and so long thereafter as oil or gas is produced in paying quantities.

43 C.F.R., 1958 Supp., §192.161, 20 F.R. 1778, provides:

§192.161 Cancellation and termination of lease. (a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to §192.120, on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. However, if the time for payment falls upon any day in which the proper office to receive payment is not open, payment received on the next
3 official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on the tract book, or, for acquired lands, on the official records relating thereto, of the appropriate land office. Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

* * *

Questions Presented

1. Whether plaintiff has any standing to sue.

2. Whether the lease held by American Petrofina expired on October 31, 1959, or, instead, continued in force until sometime after November 1, 1959, so that the Graham lease offer was premature.

3. Whether Mrs. Graham is an indispensable party to the action.

Argument

I

The plaintiff has no standing to sue. Unless McGarry can show that the Graham lease offer is improper, he must concede that the decision against him is correct, for the Mineral Leasing Act, as amended (30 U.S. C.A. §226(c)), gives "the person first making application for the lease who is qualified to hold a lease" a preference right over others and, beyond question, Mrs. Graham was the "person first making application for the lease".

In order to destroy Mrs. Graham's claim of right, Mr. McGarry resorts to a line of attack which destroys his own. He urges (Pl. Memo., p. 4-5) that the Secretary lacked power and authority to disapprove the assignment by American Petrofina and, therefore, the assignment became effective and by operation of law extended the lease for two years from the effective date of the assignment, which was October 1, 1959. But even if he were correct in his reasoning, he would then be confronted by the dilemma that (a) either the American Petrofina lease continued in effect so that both the Graham offer and his own were premature or for lands already under lease, or (b) he must find a ground for the termination of the lease and the opening of the land to new lease offers and leasing between the time of the filing of the Graham lease offer and the filing of his own offer and that he cannot do. In his memorandum in support of his motion plaintiff makes no effort to explain how the American Petrofina lease expired within that critical period. The only possible basis upon which such a contention could be rested is that the lease expired for nonpayment of rent between November 2, 1959 and November 20, 1959. Plaintiff's memorandum is silent on the point but if that be the basis of his claim, he cannot escape the fact that the termination of that lease for nonpayment of rent has never been noted, as required by the terms of Regulation 43 C.F.R. §192.161, quoted above.[2/] That construction and application of the regulation was recently upheld in Wright v. Paine, 110 U.S. App. D.C. 100, 289 F. 2d 766 (1961). Thus, if the only theory by which McGarry can destroy Mrs. Graham is correct, it destroys his only basis for a claim of right and, with it, his standing to sue.

[2/] The absence of notation is not the result of dilatoriness on the part of the Department of the Interior. It results from the view of the Secretary that the American Petrofina lease expired by its own terms and by operation of law on October 31, 1959. Under the regulations then in force, the land became open for new lease offers immediately upon expiration of the earlier lease without notation on the tract book.

II

The Secretary correctly held that the Graham lease offer was not premature. His reasons are stated in full in his opinion of January 26, 1962, a true copy of which is annexed to the complaint in this action as Exhibit "H". We have nothing to add to that opinion. We note, however, that plaintiff's attack on it is limited to an argument that it is wrong in sustaining the rights of Mrs. Graham. Nowhere does he attempt to show that he has any rights which the Secretary denied to him and, as we have shown in Point I, supra, he can have none.

III

Mrs. Graham is an indispensable party to this action. It is perfectly apparent that the principal effect of a judgment in favor of McGarry would be to deprive Mrs. Graham of the lease which she now has every reason to expect to receive. The point has been urged in this Court in cases of this sort on many occasions so we shall not reargue it here. Indeed, no argument should be required to show that when the judgment sought in an action, if granted, will have a direct, inevitable and prejudicial effect upon the rights of a person, he is an indispensable party and, without him, the action cannot proceed.

Conclusion

For the reasons stated above, we respectfully submit that the plaintiff's motion for summary judgment should be denied.

Respectfully,

/s/ Ralph S. Boyd
Attorney for Defendant

[Certificate of Service]

[Filed June 29, 1962]

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. On September 24, 1959, American Petrofina Company of Texas held an outstanding and subsisting oil and gas lease, identified as Salt Lake 067828, which had been issued, effective as of November 1, 1949, under the authority of the Mineral Leasing Act of 1920, 41 Stat. 437 (30 U.S.C. §181, et. seq.). The lands covered by the lease included lots 1 to 7, inclusive, W1/2E1/2, E1/2W1/2 and W1/2SW1/4, Sec. 25, T. 25 S., R. 21 E, S.L.M., in Grand County, Utah, aggregating 597.31 acres. The original five-year term of the lease had been extended for five years, i.e., until October 31, 1959.

2. On September 24, 1959, a partial assignment of the lease, made by American Petrofina, dated September 15, 1959, and including the 40 acres described as SW1/4SW1/4, Sec. 25, T. 25 S., R. 21 E, S.L.M., was filed in the land office at Salt Lake City. The assignee was E. Sidney Hughes. No action on that assignment was taken by the land office until November 10, 1959.

3. On November 2, 1959, Mrs. Sue C. Graham filed a lease offer for the lands in Section 25 which had been included in the lease held by American Petrofina, and other lands not in question here. Her lease offer was assigned Serial No. Utah 038493. No other offer to lease the lands was filed until November 20, 1959.

4. On November 10, 1959, the Manager of the Salt Lake City Land Office rendered a formal decision approving the partial assignment to Hughes. That decision appears in the serial register as follows:

> Partial assignment approved from American Petrofina Company of Texas to E. Sidney Hughes of the following lands: SW1/4SW1/4 Sec. 25 effective 10/1/59. Given serial SL 067828-A. Leases SL 067828 and SL - 067828-A are automatically extended under Reg. 43 CFR 192.144 (b) for two (2) years from effective date of partial assignment, or to and including 9/30/61.

4. On November 19, 1959, the Manager rendered a decision which appears in the serial register as follows:

> Decision of 11/10/59 vacated. Assignment of lease 067828-A null and void, as lease expired by operation of law 10/31/59.

No appeal was taken from that decision.

5. The termination of oil and gas lease SL 067828 has not yet been noted on the tract book.

6. On November 20, 1959, plaintiff filed his offer for an oil and gas lease on all of Sec. 25, T. 25 S., R. 21 E., S.L.M. That application was assigned serial number Utah 038802. On February 23, 1960, plaintiff filed a protest against Mrs. Graham's lease offer.

7. By decision dated March 16, 1960, the Manager of the Salt Lake City Land Office rejected Mrs. Graham's offer. Mrs. Graham appealed from that decision to the Director of the Bureau of Land Management. By decision of November 23, 1960, the Director reversed the Manager's decision. Plaintiff then appealed to the Secretary of the Interior. The Solicitor, acting pursuant to authority delegated to him by the Secretary, affirmed the decision of the Director under date of January 26, 1962.

8. This action was instituted on April 18, 1962.

Respectfully,

/s/ Ralph S. Boyd
Attorney for Defendant

[Certificate of Service: Dated June 28th, 1962]

[Filed July 13, 1962]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant moves the Court to enter summary judgment in his favor and dismissing this action because there is no genuine issue of material

fact and the defendant is entitled to judgment as a matter of law.

Respectfully,

/s/ Ralph S. Boyd
Attorney, Department of Justice

Attorney for Defendant

[Filed July 13, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

For his memorandum of points and authorities in support of his motion for summary judgment, the defendant adopts his memorandum of points and authorities in opposition to plaintiff's motion for summary judgment filed herein on June 29, 1962.

Respectfully,

/s/ Ralph S. Boyd
* * *
Attorney for Defendant

[Filed July 18, 1962]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff adopts as his points and authorities in opposition to defendant's cross-motion for summary judgment the points and authorities heretofore filed in this cause in support of plaintiff's motion for summary judgment.

Plaintiff adopts as his statement of material facts as to which there is no genuine issue the Statement of Facts heretofore filed and served with his Motion for Summary Judgment in compliance with Rule 9 of

the U. S. District Court for the District of Columbia, as amended.

/s/ Richard H. Speidel
Attorney for Plaintiff
1741 K Street, N. W.
Washington 6, D. C.

[Certificate of Service: Dated July 18th, 1962]

[Filed August 14, 1962]

MEMORANDUM OPINION

This case comes Before the Court upon cross motions by plaintiff and defendant for summary judgment.

The facts in this case are summarized briefly. The lessee of certain government-owned oil lands made an assignment of a portion of the lease shortly before the lease was due to terminate. Under applicable statutes such an assignment gives the assignee a two year extension of the part of the lease assigned to him. If the annual rental payment is not paid by the assignee before the anniversary date of the lease, then the lease is automatically terminated (30 U.S.C. 188). The assignment in the instant case was filed in the Land Office on September 24, 1959, and was approved on November 10, 1959, effective October 1, 1959. Subsequently, the Land Office discovered that the lease rentals for the first year of the extended lease, due on November 1, had not been paid. On November 19, the Office vacated its approval of the assignment and declared the assignment null and void. There was no appeal from this decision; in fact, neither of the parties to the assignment are involved in the present action. Two offers to lease were filed. Mrs. Graham filed her offer on November 2, 1959. Plaintiff Mr. McGarry filed his offer on November 20, 1959. Section 17 of the Mineral Leasing Act requires the Secretary of the Interior to issue a lease to the first qualified applicant therefor, if a lease is to be issued. The central and controlling issue for this Court to decide is, simply, the validity of the

Secretary's finding that Mrs. Graham was the first qualified applicant.

On this appeal, Mr. [Mc]Garry contends that the land in question was covered by subsisting oil and gas leases at the time when Mrs. Graham filed her offer and that her offer was invalid. In finding for Mrs. Graham, the Secretary expressly rejected this contention. He said:

> "At the time when Mrs. Graham filed her offer there was simply pending a partial assignment of a lease which, in the absence of approval of the assignment, would have expired on October 31, 1959. In Clem Daneau, A-28309 (June 14, 1960), the Department held that the mere pendency of a partial assignment at the expiration of the fixed term of the lease does not segregate the land from filing and that the land becomes available for filing after expiration of the lease. That decision applies here." (Emphasis supplied).

The Secretary continues:

> "Despite McGarry's contentions, the fact is that there were no subsisting leases in existence when the Graham offer was filed. It is true that upon subsequent approval of the assignment the effective date would have related back to October 1, 1959, and the segregated leases would have been extended for two years from that date. But it cannot be said that before the assignment was approved it was effective to create leases which were outstanding on November 2, 1959.
>
> "It is also true that upon approval of the assignment the normal procedure would have been to reject Mrs. Graham's offer. However, the rejection of the offer would have been for the reason that the land had been, in effect, leased to a prior applicant, not for the reason that the land was unavailable for filing when Mrs. Graham filed her offer.
>
> "In this case, before any action was taken on the Graham offer following approval of the assignment on November 10, 1959, the land office vacated its decision on November 19 and declared the

assignment null and void. There being no appeal from the decision of November 19, the effect of the decision was to wipe out the action taken on November 10. Thus the situation was as though the first and only action taken on the assignment was to disapprove it on November 19. This removed any obstacle to considering on its merits the Graham offer."

The plaintiff alleges, specifically, that the Secretary acted contrary to three statutory or regulatory requirements. The first provision which the Secretary allegedly violated is Title 30, U.S.C., Section 187a, which states that "The Secretary shall disapprove the assignment or sublease only for lack of qualifications of the assignee or for lack of sufficient bond." In passing, it might be well to first note that Section 188 of Title 30, U.S.C. states that if the annual rental payment is not paid by the assignee before the anniversary date of the lease, then the lease is automatically terminated. Even though this latter provision seems to give complete sanction to the Secretary's findings, the Court does not even need to reach such a conclusion. The assignment was made by the American Petrofina Company of Texas to E. Sidney Hughes. Neither the assignor nor the assignee appealed the ruling of the Land Office, which declared the assignment to be void, and neither are parties to the present action. As to Mr. McGarry, the determination by the Land Office that the assignment was void is controlling, and he has no standing to raise the issue before this Court.

The second allegation that the Secretary acted contrary to statutory or regulatory requirements, involves 43 C.F.R. 192.141(3)(f), which states that "Unless the lease account is in good standing as to the area covered by the assignment when the assignment and bonds are filed, or is placed in good standing before the assignment is reached for action the lease will be cancelled as provided in paragraph 192.161." This objection is subject to the same defect that the first one (supra) is; while the lease account was in good standing at the time the assignment in question was filed, this does not change the fact that no rental was

paid and the assignment was subsequently voided.

The final objection by the plaintiff attacks the fact that the Secretary stated that the rental due date was November 1, 1959, when, in fact, this date was a Sunday and under 30 U.S.C. 188 and 43 C.F.R. 192.171, when the due date is a Sunday, payment will be allowed on the next business day. This argument, the Court feels, misses the entire point of the Secretary's holding and the Clem Daneau case upon which it is based. These decisions clearly hold that the original lease expired on its own terms on October 31, 1959, since there was no valid assignment extending it. The assignment was void. The fact that the rental could have been paid on November 2 makes no difference at all in light of the fact that it was not paid. As the assignment was void and the lease itself expired on October 31, the Secretary's holding appears entirely in accord with sound reason.

As to the effect of a partial assignment, the holding of the Clem Daneau case is especially relevant where it states as follows:

"The appellant argues that the Department should construe the filing of a partial assignment under the pertinent regulation, 43 CRF 192.144(b), as having the same segregative effect as the filing of an application for a single extension of a lease in its primary term, since, he contends, a partial assignment of a lease is in effect an application for a 2-year extension of the assigned part of the lease.

"As previously stated, the general rule was that land * * * became available for further leasing immediately upon the expiration of its primary or extended term in the absence of a regulation of the Department providing otherwise. Therefore, had the appellant, or some other person, filed an oil and gas lease offer for the land * * * on October 1, 1958 [November 1, 1959 would be the parallel date in the present case], there would have been no valid reason for rejecting the offer. * * * The only action which could have been taken would have been to accept the application and suspend

action upon it until final action was taken on the application for a partial assignment of [the original lease]."

The Secretary's interpretation of the regulation, even if it were in question in this case, would be "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Wright v. Paine, 289 F.2d 768 (1961), 110 U.S. App. D.C. 100; Bowles v. Seminole Rock & Sand Co., (1945) 325 U.S. 410, 414, 65 Sup. Ct. 1215, 1217, 89 L.Ed. 1700. Title 5, U.S.C., Section 1009, in discussing the scope of review, states that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * * , or (6) unwarranted by the facts * * * "

In the recent case of Safarik v. Udall, Jun. 7, 1962 (U.S. Court of Appeals, D.C., #16,646, #16,647, #16,648), slip opinion at page 13, the Court said:

> "It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong (citing McKenna v. Seaton, App D.C. 259 F.2d 780, 784, c.d. 358 U.S. 835)".

The Court grants the defendant's motion for summary judgment, and, of course, denies the plaintiff's motion for summary judgment.

/s/ EDWARD A. TAMM
Judge

Dated: 8/14/62

[Filed September 4, 1962]

JUDGMENT

This action came on for hearing upon the motion of the plaintiff and the cross-motion of the defendant for summary judgment and it is by the Court this 4 day of September, 1962,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's motion for summary judgment be denied;

2. That the defendant's motion for summary judgment be granted;

3. That judgment be and it is hereby entered against the plaintiff and in favor of the defendant; and

4. That the action be and it hereby is dismissed with prejudice.

/s/ EDWARD A. TAMM
United States District Judge

[Certificate of Mailing: Dated August 20, 1962]

[Filed September 14, 1962]

NOTICE OF APPEAL

Notice is hereby given this 14th day of September, 1962, that Sheridan L. McGarry hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of September, 1962 in favor of defendant against said plaintiff.

/s/ Richard H. Speidel
Attorney for
Sheridan L. McGarry

Serve:

Ralph S. Boyd, Esq.
* * *

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17353

SHERIDAN L. MCGARRY, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RAMSEY CLARK,
Assistant Attorney General,
ROGER P. MARQUIS,
RALPH S. BOYD,
A. DONALD MILEUR,
Attorneys, Department of Justice,
Washington 25, D.C.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior correctly decided that, under Interior Department regulations concerning noncompetitive oil and gas leases, the lands involved in this case were open for lease offers on November 2, 1959, when one Graham filed an offer, appellant having filed his offer on November 20, 1959.

2. Whether the appellant has standing to sue when his argument against the validity of the prior application would also destroy the validity of his own application.

3. Whether the prior applicant is not, in any event, an indispensable party to the relief which appellant seeks here.

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INDEX

	Page
Questions presented	1
Opinion below	1
Jurisdiction	1
Statement	1
Statutes and regulations involved	4
Summary of argument	6
Argument:	
I. The Secretary correctly decided that under Interior regulations the lands involved in this case were open for lease offers on November 2, 1959	9
II. The argument which appellant advances to show that the prior application is premature would, if accepted, show his own application is subject to the same fault	14
III. The prior applicant is an indispensable party to this action	17
Conclusion	19
Appendix	20

CITATIONS

Cases:	
**Alabama Power Co.* v. *Ickes*, 302 U.S. 464	17
**Boesche* v. *Udall*, 112 U.S. App. D.C. 344, 303 F. 2d 204	12
**Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410	13
**Brady* v. *Work*, 263 U.S. 435	17
Bunker Hill Co. v. *United States*, 226 U.S. 548	10
California Co. v. *Udall*, 111 U.S. App. D.C. 262, 296 F. 2d 384	13
**Fisher* v. *Rule*, 248 U.S. 314	16
Germania Iron Co. v. *James*, 89 Fed. 811, app. dism., 195 U.S. 638	10
Hasting, etc., Railroad Co. v. *Whitney*, 132 U.S. 357	10
Hodges v. *Colcord*, 193 U.S. 192	10
**Litchfield* v. *Register and Receiver*, 9 Wall. 575	17
**L. P. Steuart & Bro.* v. *Bowles*, 78 U.S. App. D.C. 350, 140 F. 2d 703, aff'd, 322 U.S. 398	17
McKay v. *Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35	9
McKenna v. *Seaton*, 104 U.S. App. D.C. 50, 259 F. 2d 780, cert. den., 358 U.S. 835	9, 13
McMichael v. *Murphy*, 197 U.S. 304	10
Miller v. *Udall*, ——U.S. App. D.C.——, —F. 2d ——	17
**Morgan* v. *Udall*, ——U.S. App. D.C.——, —— F. 2d ——, cert. den., December 17, 1962	13
New Mexico v. *Lane*, 243 U.S. 52	17

*Cases and statutes chiefly relied upon are marked with an asterisk.

Cases—Continued	Page
Oliver v. *Udall*, ——U.S. App. D.C. ——, — F. 2d ——-------	17
**Perkins* v. *Lukens Steel Co.*, 310 U.S. 113----------	17
Putnam v. *Ickes*, 64 App. D.C. 339, 78 F. 2d 223, cert. den., 296 U.S. 612----------	10, 16
Safarik v. *Udall*, —— U.S. App. D.C. ——,— F. 2d ——------	13, 17
Shields v. *Barrow*, 17 How. 130----------	17
State of Washington v. *United States*, 87 F. 2d 421----------	17
Stearns v. *Wood*, 236 U.S. 75----------	17
**Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118----------	17
Thor-Westcliffe Development, Inc. v. *Udall*, C.A. D.C. No. 17101----------	10
**Wright* v. *Paine*, 110 U.S. App. D.C. 100, 289 F. 2d 766----	10, 13, 16
Young Americans for Freedom, Inc. v. *Rusk*, 205 F. Supp. 603, aff'd per cur —— U.S. App. D.C. ——, 303 F. 2d 771-------	16
Statutes and Regulations:	
*Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. sec. 181----------	9
Sec. 17----------	9
*Public Law 87-748, 76 Stat. 744----------	8, 18
43 C.F.R. sec. 192.143----------	9
43 C.F.R. sec. 192.43(a), 1962 Supp----------	10
*43 C.F.R. sec. 192.161----------	15
Miscellaneous:	
Belco Petroleum Corp., 69 I.D. 3----------	13, 14
Joyce A. Cabot, et al., 63 I.D. 122----------	9
**Clem Daneau*, I.D. No. A-28309----------	10
Martin Judge, 49 L.D. 171----------	10, 11
Albert C. Massa, et al., 63 I.D. 279----------	9
Duncan Miller, 66 I.D. 342----------	14
E. A. Vaughey, 63 I.D. 85----------	9, 10
R. B. Whitaker, et al., 63 I.D. 124----------	9

*Cases and statutes chiefly relied upon are marked with an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17353

SHERIDAN L. MCGARRY, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

OPINION BELOW

The unreported opinion of the district court appears at pages 37–41 of the Joint Appendix.

JURISDICTION

This is an appeal from the judgment of the district court granting appellee's motion for summary judgment. The judgment was entered September 4, 1962 (Jt. App. 42). The notice of appeal was filed September 14, 1962 (Jt. App. 42). The jurisdiction of the district court is alleged to be founded on Section 306, Title 11, of the District of Columbia Code. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATEMENT

This suit was brought to review a final decision of the Secretary of the Interior holding that it was error for the Salt Lake City Land Office to reject an offer for a noncompetitive oil and

gas lease by Mrs. Sue C. Graham. The appellant, plaintiff below, is a competing applicant for part of the lands contained in the Graham offer.[1] The disputed lands were included in a lease held by American Petrofina Company which had been issued effective as of November 1, 1949 (Jt. App. 34). The original five-year term of the lease had been extended for five years, until October 31, 1959 (*ibid.*). On September 24, 1959, a partial assignment of the lease was made by American Petrofina to E. Sidney Hughes. This partial assignment would ordinarily have extended the lease for two years. 43 C.F.R. sec. 192.144 (1954 ed.). On November 2, 1959, Mrs. Graham filed a lease offer for the disputed land.[2] On November 10, 1959, the manager of the Salt Lake City Land Office rendered a decision approving the partial assignment to Hughes. That decision appears in the serial register as follows (Jt. App. 34):

> Partial assignment approved from American Petrofina Company of Texas to E. Sidney Hughes of the following lands: SW¼SW¼ Sec. 25 effective 10/1/59. Given serial SL 067828–A. Leases SL 067828 and SL–067828–A are automatically extended under Reg. 43 CFR 192.144(b) for two (2) years from effective date of partial assignment, or to and including 9/30/61.

Shortly thereafter, however, it was brought to the attention of the Salt Lake City Land Office that the American Petrofina lease had expired for failure to pay rental before the approval of the assignment on November 10, 1959. Accordingly, on November 19, 1959, the manager entered the following decision in the serial register (Jt. App. 35):

> Decision of 11/10/59 vacated. Assignment of lease 067828–A null and void, as lease expired by operation of law 10/31/59.

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[1] The lands in dispute in this case are Lots 1 to 7, inclusive, W½E½, E½W½ and W½SW¼, Sec. 25, T. 25 S., R. 21 E., S.L.M., in Grant County, Utah, aggregating 597.31 acres (Jt. App. 34).

[2] The American Petrofina lease, leaving aside for the moment any question of extension by partial assignment, expired on October 31, 1959. November 1, 1959, was a Sunday. Monday, November 2, 1959, was the first working day thereafter.

No appeal was taken from the above decision and it became the final administrative decision of the Department of the Interior in the matter. American Petrofina and Mr. Hughes, the parties directly concerned in the assignment, are not involved in the outcome of the present suit between Mr. McGarry and the Secretary.

On November 20, 1959, appellant filed his offer for an oil and gas lease on the disputed lands. Subsequently, appellant filed a protest against Mrs. Graham's lease offer. The manager of the Salt Lake City Land Office rejected the Graham lease offer on the theory that the American Petrofina partial assignment had segregated the disputed lands and prevented further application until the cancellation of the assignment and lease was noted on the serial register on November 19, 1959 (Jt. App. 8–9). Mrs. Graham appealed to the Bureau of Land Management, which reversed the decision of the Salt Lake City Land Office (Jt. App. 10–14). Noting that "the question presented by this appeal is whether or not the lands * * * were open for new lease offers on November 2, 1959, when [Mrs. Graham's] offer was filed" (Jt. App. 12), the decision of the Bureau was that the lands were open for new lease offers on that date. It was held that on November 2, 1959, the lands in dispute were covered only by an application for an assignment, and not by an outstanding lease. Therefore, the Department was bound to accept the Graham offer. On appeal to the Secretary of the Interior, the Bureau's decision was affirmed (Jt. App. 15–18). The Secretary held that (Jt. App. 17):

> Despite McGarry's contentions, the fact is that there were no subsisting leases in existence when the Graham offer was filed. It is true that upon subsequent approval of the assignment the effective date would have related back to October 1, 1959, and the segregated leases would have been extended for two years from that date. But it cannot be said that before the assignment was approved it was effective to create leases which were outstanding on November 2, 1959.

The termination of the American Petrofina lease for failure to pay rent was not noted on the tract book as required by the

controlling regulation then in effect, 43 C.F.R. sec. 192.161, 20 Fed. Reg. 1778, if the failure to pay rental were the cause of the termination (Jt. App. 35). The regulations then in force did not require such a tract book notation before the land became available for leasing again where the lease expired at the end of its term.[3]

The appellant then brought this suit in the district court. Both sides moved for summary judgment (Jt. App. 19, 35–36). The district court held the Secretary of the Interior was correct in finding that Mrs. Graham was the first qualified applicant (Jt. App. 37–41). Accordingly, the district court entered summary judgment in favor of the appellee, Udall (Jt. App. 42). This appeal followed.

STATUTES AND REGULATIONS INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by the Act of August 8, 1946, 60 Stat. 951, 30 U.S.C. sec. 226, provided in pertinent part as follows:

> All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

Section 30(a) of the Mineral Leasing Act of 1920, added by the Act of August 8, 1946, 60 Stat. 950, 955, as amended, 30 U.S.C. sec. 187a, provided in pertinent part as follows:

> * * * any oil or gas lease issued under the authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary * * * and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof * * *. Un-

[3] Under present regulations this situation could not arise because the lands are not available until posted. See *Thor-Westcliffe Development, Inc. v. Udall*, No. 17101, now awaiting decision.

til such approval, however, the assignor or sublessor * * * shall continue to be responsible * * *. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond * * *. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease * * *. Any partial assignment of any lease shall segregate the assigned and retained portions thereof * * *; and such segregated leases shall continue in full force and effect for the primary term of the original lease * * *. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

43 C.F.R. sec. 192.140 (1954 rev. ed.) provides:

Assignments or transfers of leases or interests therein. Leases may be assigned or subleased as to all or part of the leased acreage and as to either a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office of all the papers required by Secs. 192.141 and 192.142. * * *

43. C.F.R. sec. 192.143 (1954 rev. ed.) provides:

Effect of assignment of particular tract. When an assignment is made of all or part of the record title to a portion of the acreage in a lease, the assigned acreage becomes segregated into a separate and distinct lease. The assignee becomes a lessee of the Government as to the segregated tract and is bound by the terms of the lease as though he had obtained the lease through an application filed in his own name and the assignment after its approval will be the basis of a new record.

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43 C.F.R. sec. 192.144 (1954 rev. ed.) provides:

> *Extension of leases segregated by assignment.* (a) Any lease segregated by assignment, including the retained portion, shall continue in effect for the primary term of the original lease, or for two years after the date of discovery of oil or gas * * *.
>
> (b) Undeveloped parts of leases assigned out of leases which are in their extended term under any provision of the act shall continue in effect for two years, and so long thereafter as oil or gas is produced in paying quantities.

43 C.F.R. sec. 192.161, 20 Fed. Reg. 1778 (March 17, 1955), provides:

> *Cancellation and termination of lease.* (a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to Sec. 192.120, on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. However, if the time for payment falls upon any day in which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on the tract book, * * *. Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

SUMMARY OF ARGUMENT

I

The Secretary correctly decided that under Interior regulations the lands involved in this case were open for lease offers on November 2, 1959, when Mrs. Graham filed a lease offer. Since appellant's offer was not filed until November 20, 1959, the Graham offer must be invalidated if appellant is to prevail.

Appellant contends that the land was still under an outstanding lease on November 2, and therefore the Graham offer should have been rejected. Where an offer is made for land still under an outstanding lease, the general rule of the Department of the Interior is that such offer will be rejected as premature. Where the land applied for has been covered by a lease which was relinquished, terminated by operation of law for nonpayment of rental, or was canceled, the regulations provided that such land will be open to new lease offers only after notation on the official records of the cancellation, relinquishment or termination. Offers filed before such notation are rejected as premature. However, the notation rule has not generally been applied in the mineral leasing program where a lease expires at the end of its normal term.

In this case the Secretary decided that the prior lease expired at the end of its normal term on October 31, 1959. On the next following working day, the Secretary held, "there was simply pending a partial assignment of a lease which, in absence of approval of the assignment, would have expired on October 31, 1959." Therefore the land was immediately available for the filing of new lease offers. The Secretary's decision is a reasonable interpretation of his own regulations, and is of controlling weight since it is neither plainly erroneous nor inconsistent with the regulation. In carrying out his functions administering public lands, the Secretary is accorded a wide area of discretion which will not be disturbed by the court unless he is clearly wrong.

The appellant's reliance on two prior Interior decisions is misplaced, since both are factually distinguishable. The rule that when the last day on which one could ordinarily make an assignment falls on a holiday, the assignment may be made on the next working day is not contrary to the Secretary's holding here. Nor is the rule that where there is a failure to pay one of the annual installments of rent during the *pendency* of the term, the lease does not terminate until after the anniversary date. The present case contains a lease which expired at the *end* of the term.

II

The argument which appellant advances to show that the prior application is premature would, if accepted, show that his own application is subject to the same fault. It is appellant's theory that the assignment had the effect of extending the term of the prior lease for two years, even without the approval of the Department of the Interior. Under this theory the lease would have expired, not at the end of the normal term, but at the close of the anniversary date for the nonpayment of rent. When a lease terminated for nonpayment of rent, the pertinent regulation provided that the land was not available for new lease offers until notation of such termination on the tract book. The Secretary has made no such notation because he considered the lease expired at the end of its term and that did not require a notation.

Assuming, *arguendo*, the Secretary is wrong and appellant is right, the lands would not have been opened for new lease offers even to the present time, and appellant's offer, as well as Graham's, would have to be rejected. Since appellant cannot show he is entitled to a lease even under his own theory, he has failed to prove a claim upon which relief can be granted against the appellee.

III

In any event, the prior applicant is an indispensable party to this action. It is evident that the principal effect of a decision by this Court in favor of appellant, McGarry, would be to deprive Mrs. Graham of the lease which she now has every reason to expect to receive. This makes Mrs. Graham an indispensable party under the doctrine of the cases cited and exhaustively argued to this Court in two recent cases. The enactment of Public Law 87–748, 76 Stat. 744, on October 5, 1962, strengthens the possibility that an interested person can await the outcome of a suit in the District of Columbia to which he is not a party and, if unfavorable, relitigate the entire matter in another judicial district. The Secretary in such circumstances might well become subject to conflicting judgments as to who should get the lease. The appellant's suit should, therefore, be dismissed for lack of an indispensable party.

ARGUMENT

I

The Secretary correctly decided that under Interior regulations the lands involved in this case were open for lease offers on November 2, 1959

This Court is asked to review a decision of the Secretary of the Interior, affirmed by the district court, that certain lands in the public domain in Utah were available for lease offers at the time Mrs. Graham filed a lease offer on November 2, 1959. Since appellant's lease offer was not filed until November 20, 1959, and the statute requires that noncompetitive leases be issued to the person whose offer is prior in time, appellant must invalidate the Graham offer if he is to secure the lease.[4] Sec. 17, Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. sec. 226; *McKenna* v. *Seaton*, 104 U.S. App. D.C. 50, 51, 259 F. 2d 780, 781 (1958), cert. den., 358 U.S. 835; *McKay* v. *Wahlenmaier*, 96 U.S. App. D.C. 313, 317, 226 F. 2d 35, 37 (1955).

In order to understand the attack which appellant makes on the Graham offer, it may be helpful to review briefly some of the pertinent administrative rulings of the Department of the Interior. When public domain land is leased under the Mineral Leasing Act of 1920, *supra*, it is segregated[5] from the rest of the public domain so as to be no longer open for lease offers, and any offer filed while the lease is still in effect is considered invalid and rejected. See *Joyce A. Cabot, et al.*, 63 I.D. 122 (1956); *R. B. Whitaker, et al.*, 63 I.D. 124 (1956); *Albert C. Massa, et al.*, 63 I.D. 279, 286 (1956). This rule is derived from an older rule relating to the administration of the public do-

[4] It is the view of the appellee, however, that appellant could not prevail even if the Graham offer were invalid. This is discussed in Point II, *infra*, p. 14.

[5] The term "segregated" is used in two different senses in this brief. In the regulation, 43 C.F.R. sec. 192.143 *et seq.*, quoted above, p. 5, relating to assignment of a part of an outstanding lease, the term "segregated" is used to indicate that the remaining lands of the old lease and the assigned portion become segregated into two different leases. The term is used above, as it is in many Interior decisions, to indicate that land on the public domain formerly open to settlement or appropriation has become segregated in the sense of being already settled or appropriated and, hence, not open for subsequent entry. See *E. A. Vaughey*, 63 I.D. 85 (1956).

main, known as the tract book or notation rule, viz., that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the public land records. *Bunker Hill Co.* v. *United States,* 226 U.S. 548, 550 (1913); *McMichael* v. *Murphy,* 197 U.S. 304, 310–312 (1905); *Hodges* v. *Colcord,* 193 U.S. 192, 194–196 (1904); *Hastings, etc. Railroad Co.* v. *Whitney,* 132 U.S. 357, 360–366 (1889); *Putnam* v. *Ickes,* 64 App. D.C. 339, 342, 78 F. 2d 223, 226 (1935), cert. den., 296 U.S. 612; *Germania Iron Co.* v. *James,* 89 Fed. 811, 814–817 (C.A. 8, 1898), app. dism., 195 U.S. 638. This principle was applied to oil and gas leases shortly after the inception of the mineral leasing program. *Martin Judge,* 49 L.D. 171 (1922); *E. A. Vaughey,* 63 I.D. 85 (1956).

The rule has now been codified in various Interior regulations which provide, e.g., that lands in canceled or relinquished leases, or in leases which terminate by operation of law for nonpayment of rental, shall be subject to filing of new lease offers *only after notation on the official record* of the cancellation, relinquishment or termination (43 C.F.R. sec. 192.43(a), 1962 Supp.). An earlier version of this regulation was considered by this Court in *Wright* v. *Paine,* 110 U.S. App. D.C. 100, 289 F. 2d 766 (1961).[6]

However, the notation or tract book rule has not generally been applied in the mineral leasing program where a lease expires at the end of its term pursuant to the provisions of the lease contract. In the absence of a regulation to the contrary, the rule in the mineral leasing program has been that land in an expired lease becomes available immediately to further leasing.[7] *Clem Daneau,* I.D. No. A–28309 (App., *infra,* pp. 20–23).

There is a reason for the distinction between leases which expire normally at the end of their terms and those which

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[6] The regulation is also under consideration in *Thor-Westcliffe Development, Inc.* v. *Udall,* C.A. D.C. No. 17101, now pending before this Court.

[7] This statement relates only to the period pertinent to the decision of this case. Subsequently, in December 1959, 43 C.F.R. sec. 192.43 was amended to provide that, even where leases expire at the end of their stated term, the land becomes available for new offers only after notice of its availability is posted in the local land office and certain other procedures are followed.

are relinquished, canceled or terminated prior to the normal expiration of their terms. In the first case, prospective applicants can learn in advance when the lease term normally expires from the public records available in the land office, but in the second case they cannot know whether the lease was terminated because the rental has not been paid, or a relinquishment filed or a cancellation ordered, until a notation on the public records has been made. Therefore, the notation or tract book rule has not been applied where there has been sufficient public notice of the expiration of the lease.

Appellant's attack on Mrs. Graham's lease offer is that it was invalid because supposedly made when another lease on the same land was outstanding. Appellant rejects the administrative decision that the prior lease expired at the end of its extended term on October 31, 1959, thereby bringing into operation the rule that lands in a prior expired lease are available immediately for new lease offers.

The Secretary of the Interior, interpreting the pertinent provisions of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. sec. 181 *et seq.*, and his regulations issued pursuant to the Act, found that the Petrofina lease had expired at the end of its extended term, October 31, 1959, and therefore the land was available for new lease offers on the next following work day, November 2, 1959 (Jt. App. 15–18). The Secretary found that on that date "there was simply pending a partial assignment of a lease which, in the absence of approval of the assignment, would have expired on October 31, 1959" (Jt. App. 17). In an earlier decision, *Clem Daneau* (App., *infra*, p. 20), the Secretary had held that the mere pendency of a partial assignment at the expiration of a fixed term of a lease does not segregate the land from the filing of new lease offers and that the land becomes available immediately on expiration of the previous lease. The *Clem Daneau* decision was applied here.

The Secretary's opinion continued (Jt. App. 17–18):

> McGarry seeks to distinguish the *Daneau* case by saying that the assignment in that case was defective because it was not accompanied by the consent of the surety on the lease bond, whereas here the assignment

was proper. A reading of the *Daneau* decision shows that it was not based upon any defect in the assignment there considered and that the factors upon which the decision was based are equally applicable here.

Despite McGarry's contentions, the fact is that there were no subsisting leases in existence when the Graham offer was filed. It is true that upon subsequent approval of the assignment the effective date would have related back to October 1, 1959, and the segregated leases would have been extended for two years from that date. But it cannot be said that before the assignment was approved it was effective to create leases which were outstanding on November 2, 1959.

It is also true that upon approval of the assignment the normal procedure would have been to reject Mrs. Graham's offer. However, the rejection of the offer would have been for the reason that the land had been, in effect, leased to a prior applicant, not for the reason that the land was unavailable for filing when Mrs. Graham filed her offer.

In this case, before any action was taken on the Graham offer following approval of the assignment on November 10, 1959, the land office vacated its decision on November 19, and declared the assignment null and void. There being no appeal from the decision of November 19, the effect of the decision was to wipe out the action taken on November 10. Thus the situation was as though the first and only action taken on the assignment was to disapprove it on November 19. This removed any obstacle to considering on its merits the Graham offer.

The determination of the Secretary as to the time the old lease expired, the time the land was open for new offers, and the legal effect of the pending, unapproved assignment is correct. It is a reasonable interpretation by the Secretary of his own regulations and should not be rejected by the courts. *Boesche* v. *Udall*, 112 U.S. App. D.C. 344, 346, 303 F. 2d 204, 206 (1961). The Secretary's interpretation of his own

regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Wright* v. *Paine*, 110 U.S. App. D.C. 100, 102, 289 F. 2d 766, 768 (1961); *Morgan* v. *Udall*,—— U.S. App. D.C. ——, — F. 2d —— (1962, cert. den., December 17, 1962. The Secretary of the Interior is the official charged with administering the Mineral Leasing Act. An administrative official charged with the duty of administering a statute has a duty to determine the meaning of the statute. Where the question is one of specific application of broad statutory provisions which the administering agency has determined initially, the function of the reviewing court is a limited one. *California Co.* v. *Udall*, 111 U.S. App. D.C. 262, 266, 296, F. 2d 384, 388 (1961). It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by the court unless it is clearly wrong. *Safarik* v. *Udall*, —— U.S. App. D.C. ——, ——, — F. 2d ——, —— (1962); *McKenna* v. *Seaton*, 104 U.S. App. D.C. 50, 54, 259 F. 2d 780, 784 (1958), cert. den., 358 U.S. 835.

Appellant's reliance on *Belco Petroleum Corp.*, 69 I.D. 3 (1962), is misplaced. *Belco* does not deal with the status of an unexpired lease which has been assigned but not approved and there has been a failure to pay rental needed to keep the assignment alive. Nor does *Belco* deal with any part of this problem. *Belco* is merely a holding that under the rule that an assignment must be made before the beginning of the twelfth month of the last year of the lease term, where the last day of the eleventh month falls on a holiday, the assignment may be made on the first day of the twelfth month. The holding in *Belco* is consistent with the Secretary's decision in the present case. The Secretary would agree that the rental payment could have been made Monday, November 2, 1959. But since payment was not made, the lease expired on the last day of its term, October 31, 1959. The additional day to

make payment is not unlike the grace period of an insurance policy.

Nor is *Duncan Miller*, 66 I.D. 342 (1959), on which appellant relies, applicable to the facts of the present case.[6] *Duncan Miller* holds that, by virtue of an express statutory provision and a clear legislative history, the lessee has the right to pay the next year's rental on the anniversary date of the lease. The statutory provision for automatic termination for nonpayment of rental does not take effect until the day after the anniversary date. However, this ruling applies during the pendency of the fixed term of the lease. In the *Duncan Miller* case, for example, the term would have run until 1959, but for the statutory provision which automatically terminated it when the rent had not been paid by the anniversary date in 1955. In contrast, the present case contains a lease which expired at the end of its fixed term, October 31, 1959, the assignment having no effect until it is approved. Therefore, as the Secretary held, on November 2, 1959, there was no outstanding lease, but merely an unapproved assignment whose continued validity depended on the deposit of the rental before the end of the anniversary date.

II

The argument which appellant advances to show that the prior application is premature would, if accepted, show his own application is subject to the same fault

In order to prevail in this suit, appellant must not only show that Mrs. Graham's offer was invalid, but that his subsequent offer was a proper one which would entitle him to the issuance of a lease. Under the theory of the case adopted by the Secre-

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[6] At page 9 of appellant's brief, it is stated:

"In the case of *Belco*, *supra*, the Secretary, citing *Duncan Miller*, A-28041, 66 I.D. 342, September 23, 1959, concluded, 'Thus, it was the clear intent of the Department and Congress that a leasee has the whole of the anniversary date of the lease while the Land Office is open for business within which he may pay his advance rental and prevent the automatic termination of his lease, and, until the anniversary date is passed, the lease is not terminated . . . .'"

Neither the quoted language nor a citation of *Duncan Miller* appears in *Belco*, 69 I.D. 3 (1962). Instead, the quoted language is taken directly from the *Duncan Miller* decision, itself.

tary, both the Graham offer and appellant's offer were good,[9] but Graham's was prior in time. Under the theory which appellant urges, the Graham offer would be struck down, but it would also make appellant's offer equally invalid.

It is the Secretary's decision that the lease expired at the end of its extended term on October 31, 1959. Under the general rule as discussed above, pp. 9–10, the land immediately became available for new offers. It is appellant's theory, however, that the assignment had the effect of extending the term of the lease for two years beginning the first day of the month after it was filed, even without the approval of the Department of the Interior and, therefore, under this theory the lease would have expired not at the end of its normal term but at the close of the anniversary date *for the nonpayment of rent*. When a lease is terminated for nonpayment of rent, the regulation, 43 C.F.R. sec. 192.161, in effect during the period pertinent to this case, provided (see *supra*, p. 6:)

> The termination of the lease for failure to pay the rental must be noted on the tract book, * * *. Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

The Secretary of the Interior did not make any notation on the tract book that the Petrofina lease was terminated for failure to pay rental. The reason he did not is, of course, that he considered the lease to have expired at the end of its term which did not require a notation before the lands became available for new lease offers.

Assuming, *arguendo*, that the Secretary is wrong and appellant is right, the Petrofina lease has terminated for failure to pay rental. Since the required notation has not been made,

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[9] Insofar as the record in this case discloses, the Secretary's decision in this case goes no further than holding that the Graham offer is not invalid for the reason which appellant urges. This would not preclude a subsequent finding that either or both offers are invalid for some reason not appearing on this record, e.g., holding acreage in excess of the maximum permitted.

the lands would not have been opened for new lease offers even to the present time and appellant's offer, as well as Graham's, would have to be rejected. The Secretary's position has been recently upheld in *Wright* v. *Paine,* 110 U.S. App. D.C. 100, 289 F. 2d 766 (1961).

Appellant realizes his dilemma and tries to explain it away on page 10 of his brief. Appellant says "the erroneous revoking decision" of November 19, 1959, had already been issued when he filed his offer. Therefore, appellant explains, "The assignment had been declared null and void and the prior lease had reverted to a status of expiration at the end of its stated term * * *." As we understand this explanation, the lease which really terminated for failure to pay rent on November 2 (according to appellant's theory) was made by an erroneous decision of the Department of the Interior issued on November 19, to expire on October 31.

Giving appellant the benefit of every doubt, we do not believe it can be said as a matter of law that appellant's rather ingenious theory is so clearly right as to require this Court to force the Secretary to adopt it. Once a lease has been terminated by operation of law for failure to pay rental, there isn't any way it can be revived for purposes of being given an earlier expiration date for a different reason. Appellant is still faced with the dilemma that either (a) the Petrofina lease expired on October 31 at the end of its term, or (b) it terminated after November 2, for failure to pay rent, which termination has not been noted in the tract book. And in neither case can appellant show that he is entitled to a lease. Therefore, appellant has failed to prove a claim upon which relief can be granted against the appellee. *Fisher* v. *Rule,* 248 U.S. 314, 317–318 (1919); cf. *Putnam* v. *Ickes,* 64 App. D.C. 339, 78 F. 2d 223, 227 (1935), cert. den., 296 U.S. 612. Before appellant can maintain this suit, there must be a violation of some legal right belonging to him. *Young Americans for Freedom, Inc.* v. *Rusk,* 205 F. Supp. 603 (D. D.C. 1962), aff'd *per cur.* —— U.S. App. D.C. ——, 303 F. 2d 771 (1962). Since appellant cannot show under the facts of this case that he is entitled to

a lease, the case presents only an abstract question and the district court properly held for the appellee Secretary. *Oliver* v. *Udall,* —— U.S. App. D.C. ——, —— F. 2d — (1962). Applicable to the present case is this Court's statement in *L.P. Steuart & Bro.* v. *Bowles,* 78 U.S. App. D.C. 350, 352, 140 F. 2d 703, 705 (1944), aff'd, 322 U.S. 398 (1944):

> Even if appellant's contentions to the contrary were sound they would not aid appellant, since litigants "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

The language quoted by the Court is from *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940), at p. 125. See also *Tennessee Electric Power Co.* v. *T.V.A.,* 306 U.S. 118, 137–138 (1939); *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938); *Stearns* v. *Wood,* 236 U.S. 75 (1915).

We submit that there is no warrant for applying the decision of November 19 retroactively to appellant, but not Graham.

III

The prior applicant is an indispensable party to this action action

It is evident that the principal effect of a decision by this Court in favor of appellant, McGarry, would be to deprive Mrs. Graham of the lease which she now has every reason to expect to receive. Appellee must therefore insist that this litigation cannot proceed without Mrs. Graham being present, for the reason that she is an indispensable party under the doctrine of the following cases: *Shields* v. *Barrow,* 17 How. 130, 139 (1854); *State of Washington* v. *United States,* 87 F. 2d 421, 425–428 (1936); *Brady* v. *Work,* 263 U.S. 435 (1924); *New Mexico* v. *Lane,* 243 U.S. 52 (1917); *Litchfield* v. *Register and Receiver,* 9 Wall. 575 (1869).

A similar point has been exhaustively argued to this Court in two recent cases. *Safarik* v. *Udall,* —— U.S. App. D.C. ——, —— F. 2d — (1962); *Miller* v. *Udall,* —— U.S. App. D.C. ——, —— F. 2d — (1962). In both cases, this Court expressly noted

that it was not necessary to reach the indispensable party argument. It may well be that the Court will once again dispose of the case without reaching that argument. But if it does become necessary for the Court to decide the point, there is an additional complication which was not present in the earlier cases.

As the Secretary pointed out in the *Miller* and *Safarik* cases, one of the basic reasons for requiring dismissal of a suit for lack of an indispensable party is the probable inefficacy of the court's decree. The absent party can wait the outcome of the suit and, if unfavorable, bring a new action against the Secretary to relitigate the entire case. Prior to October 5, 1962, it was arguable that the Secretary could not be sued anyplace except in the District of Columbia in suits like the present one, and thus the danger of conflicting decrees against the Secretary was minimized. On that date, however, Public Law 87–748, 76 Stat. 744, was approved giving venue in cases like the present one to "any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action." Service may be had by certified mail on any federal officer beyond the territorial limits of the judicial district in which the action is brought. This means, at the very least, that in the present case Mrs. Graham could sue the Secretary in Utah after the final decree by this Court. Generally speaking, it could mean that the Secretary might be sued in several judicial districts depending on where the land is located and where the various defendant officers of the Department of the Interior reside. Thus, the possibility of conflicting decisions against the Secretary ordering the same lease to be given to different applicants is now more than ever a very real possibility. It is, therefore, concluded that the appellant's suit should be dismissed for lack of an indispensable party.

CONCLUSION

The judgment of the district court is correct and should be affirmed.

Respectfully submitted.

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DECEMBER 1962

APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY, WASHINGTON 25, D.C.

A–28309, Clem Daneau

New Mexico 054266. Oil and gas lease offer rejected. Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On October 1, 1958, Clem Daneau filed an oil and gas lease offer, New Mexico 054266, for land described as the SE¼ sec. 17, T. 9 S., R. 37 E., N.M.P.M., New Mexico, a total of 160 acres.

By a decision dated May 8, 1959, the manager of the Santa Fe land office rejected the offer for the reason that the total acreage was less than 640 acres, and the offer did not come within the exceptions to the rule in 43 CFR, 1958 Supp., 192.42(d)[1] that an application may not be for less than 640 acres for the reason that on October 1, 1958, adjoining land, described as the E½NE¼ sec. 17, T. 9 S., R. 37 E., was available for filing. Daneau appealed to the Director, Bureau of Land Management, from the manager's decision.

It appears from the record that the E½NE¼ sec. 17 was embraced in oil and gas lease Las Cruces 067706–B, issued effective October 1, 1948, and extended for 5 years to September 30, 1958. On July 17, 1958, a partial assignment of the lease was filed. On January 21, 1959, the manager rejected the

[1] 43 CFR, 1958 Supp., 192.42(d) provided in pertinent part that:

"* * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

* * * * *

"(2) Where the land is surrounded by lands not available for leasing under the act."

This regulation was amended without material change by Circular 2017, 24 F.R. 4141, and now appears as 43 CFR, 1959 Supp., 192.42(d).

partial assignment because the assignment was not accompanied by the consent of the surety under the bond on file.

In a decision dated November 19, 1959, the Acting Director, Bureau of Land Management, held that since the partial assignment of Las Cruces 067706–B was defective the lease expired by operation of law on September 30, 1958, and the lands in the former lease should have been included in Daneau's lease offer since it was for less than 640 acres of land. The applicant has appealed to the Secretary of the Interior from the Acting Director's decision.

The question presented by this appeal is whether or not the lands in lease Las Cruces 067706–B were available for leasing on October 1, 1958, or whether the pendency of the partial assignment on the expiration date of the lease had the effect of segregating the lands in the lease from further leasing until final action on the assignment was taken so that the lands were not available for leasing on October 1, 1958. Thus, the essential question is the "availability" of lands in a lease which expires while a partial application is pending. The question would be the same whether the assignment was or was not allowable.

It is within the province of the Secretary of the Interior to determine when land should be available for noncompetitive oil and gas lease offers. *M. A. Machris, Melvin A. Brown,* 63 I. D. 161 (1956). Thus, the Secretary has in the past provided by regulation that lands in canceled or relinquished leases become available for further leasing upon notation of the cancellation or relinquishment upon the tract books of the local land office. 43 CFR, 1958 Supp., 192.43. Recently, 43 CFR, 1958 Supp., 192.43 was amended to provide that lands in canceled or relinquished leases or leases that terminate by operation of law shall become available for further leasing on the fifth working day after the third Monday in each month when a list of canceled, relinquished or expired leases is posted on a bulletin board in each land office.[2] 43 CFR, 1959. 192.43. But in the absence of a regulation providing otherwise the

[2] Under this regulation, the land in Las Cruces 067706–B would not have been available for leasing until such time as it was included in the posted list.

general rule has always been that land in an expired lease becomes available immediately to further leasing. *W. V. Moore*, 64 I. D. 419 (1957).

There is no regulation of the Department which expresses the segregative effect, or lack thereof, of the filing of an application for a partial assignment of an oil and gas lease in its extended term. However, in respect to the filing of an application for a single extension of an oil and gas lease of land on which there is no producing oil and gas well, the pertinent regulation, 43 CFR, 1959 Supp., 192.120(f), provides that the timely filing of an application for a single extension shall have the effect of segregating the lands embraced therein from further leasing until final action is taken on the application.

The appellant argues that the Department should construe the filing of a partial assignment under the pertinent regulation, 43 CFR 192.144(b), as having the same segregative effect as the filing of an application for a single extension of a lease in its primary term, since, he contends, a partial assignment of a lease is in effect an application for a 2-year extension of the assigned part of the lease.

As previously stated, the general rule was that land in an oil and gas lease became available for further leasing immediately on the expiration of its primary or extended term in the absence of a regulation of the Department providing otherwise. Therefore, had the appellant, or some other person, filed an oil and gas lease offer for the land in Las Cruces 067706–B on October 1, 1958, there would have been no valid reason for rejecting the offer. The Department could not have refused to accept a lease offer for the land because no regulation of the nature of 43 CFR 192.120(f) existed. The only action which could have been taken would have been to accept the application and suspend action upon it until final action was taken on the application for a partial assignment of Las Cruces 067706–B.

It is therefore concluded that at the time material hereto, since no departmental regulation provided that the pendency, upon the expiration of the extended term of a lease, of a partial assignment of the lease segregated the land in the assigned or retained portion of the lease from further leasing until final

action was taken on the application for assignment, the lands in lease Las Cruces 067706–B were available for leasing on October 1, 1958, and should have been included in the appellant's lease offer. An application for less than 640 acres is properly rejected where the offer fails to include adjoining lands available for leasing when it is filed. *Natalie Z. Shell,* 62 I.D. 417 (1955); *Janis M. Koslosky,* 66 I.D. 384 (1959); *L. E. Linck,* 67 I.D. (A–28190, April 1, 1960); *Lora Coyler et al.,* A–28194 (April 15, 1960).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

(Sgd) EDMUND T. FRITZ,
Deputy Solicitor.

U.S. GOVERNMENT PRINTING OFFICE: 19

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,353

SHERIDAN L. McGARRY,

Appellant,

v.

STEWART L. UDALL,
Secretary of the Department of Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR APPELLANT

STATEMENT

Appellant files this reply brief, having had the benefit of Appellee's answering brief, in hope of further clarifying the issues. Appellee has also raised a new question involving the doctrine of indispensible parties which must be answered.

This brief will be particularly directed to the following:

QUESTIONS PRESENTED

1. Whether the lease offer of Mrs. Graham was invalid because prematurely filed;

2. Whether the appellant's lease offer was valid;

3. Whether an indispensable party was not joined.

SUMMARY OF ARGUMENT

1. The only practical test for determining whether lands are "open" for leasing is whether the Secretary can immediately lease them. A lease offer not immediately acceptable by the Secretary is premature and dies. It may not be harbored until its prematurity is cured by administrative fiat for this gives the offeror a favored "second chance" inconsistent with the Statute which requires an equal opportunity for every qualified applicant. The lease's legal effectiveness in all its aspects terminated only at 3 p.m. on November 2 and no offer could be valid until after that.

2. When appellant McGarry filed his offer on November 20, Mrs. Graham's offer was dead, the lease had expired, and the Secretary could immediately accept appellant's offer because the lands were open.

3. It is settled law that adverse claimants are not indispensable parties in actions like that at bar.

ARGUMENT

I

THAT MRS. GRAHAM'S LEASE OFFER WAS INVALID

Appellant wishes to clarify at once a possible misunderstanding of appellee's counsel. It is not appellant's contention that "the assignment had the effect of extending the term of the prior lease for two

years, even without the approval of the Department of the Interior." (Appellee's brief, p. 8). Appellant's denial of that contention is not insistent with the assertion that the prior lease holder and its assignee had legally effective rights all through the day of Mrs. Graham's offer.

The disputed lands were included in a lease held by American Petrofina Company which had been issued as of November 1, 1949 (Jt. App. 34). The original five-year term of the lease had been extended for five years until October 31, 1959. On September 24, 1959, a partial assignment of the lease was made by American Petrofina to E. Sidney Hughes. This partial assignment would ordinarily have extended the lease for two years. 43 C.F.R. sec. 192.144 (1954 ed.).

The right to make such a partial assignment and thereby to prolong the life of the lease for two years and the exercise of that right commanded the acquiescence of the Secretary to the extent that the Secretary could not lease to a third party while an application for approval of a partial assignment covered the land. Thus, this statutory right to make such a partial assignment was an incident of ownership of the original five year lease (as extended). It was an incident of ownership that gave the lessee, by right of assignment, a temporarily greater power to determine who would succeed to the rights of lease-holder than had the Secretary. This incident of ownership, this right to partially assign, fully expired in the case at bar only at the close of business (3:00 p.m.) on November 2, 1962.

In Clem Daneau, A-28309 (1960), the Department held that the mere pendency of one of these partial assignments does not segregate the land from filing and that the land becomes available for filing after expiration of the lease.

And, accordingly, appellee's brief quotes the Secretary's opinion (Jt. App. 17-18) that "Despite McGarry's contentions, the fact is that there were no subsisting leases in existence when the Graham offer

was filed," for on November 19, the Secretary had rendered the opinion that the Petrofina lease expired on October 31, 1959 "by operation of law." (Appellee's brief, p. 2).

The question is: by operation of what law? Certainly not by operation of 43 C.F.R. sec. 192.144 (1954 ed.) for the rights of the lease owner created by that law were in force as late as 3:00 p.m. on November 2, 1959. They interposed an obstacle to the Secretary's full freedom of action. At most he could "accept" Mrs. Graham's offer only tentatively and "suspend action on it" (Jt. App., p. 13), which is not contractual acceptance at all but mere harboring. In other words, the Daneau holding to the contrary notwithstanding, the land was segregated in the sense of its being appropriated beyond the immediate power of the Secretary freely to lease. He had to wait. He could not give possession on November 2.

It is appellant's position that the only practical test as to whether lands are open to filing is whether the Secretary can make an immediate contract. We say, and the Secretary does not deny, that the pending application for approval of a partial assignment restricted his action. The application for approval had unassailable preference over the Graham offer. The channel of commerce between the offeror and the Secretary was not open when Mrs. Graham filed her bid.

The approval of the assignment on November 10 was automatic, and not until after the discovery that no rent had been paid was the corpse of Mrs. Graham's bid exhumed, and, to paraphrase the Secretary, "any obstacles to considering (it) on its merits" were "removed." (Appellee's brief, p. 12). But obstacles there were on November 2 and they were operative legal rights.

In relatively fast moving transactions in which there is no dicker over terms, acceptance calls for an instantaneous act. If the offeree Secretary is under an inhibition preventing his performance of the instantaneous act of acceptance at the time the bid is made, the offer is

premature and invalid. There can be no revival or retroactive acceptance of a dead bid, for if the Secretary arbitrarily harbors a bid not immediately contractable when made, he affords a second chance to an originally defective offer with prejudice to other applicants, as has now happened to the appellant.

To say as does the Director (Jt. App., p. 13), "the lands were covered only by an application for partial assignment, not by an outstanding lease," reiterates the false distinction made in Daneau. The legal incident that empowers the leaseholder to apply for approval of a partial assignment is an aspect or function of the lease. The lease and the power constitute a coextensive undifferentiateable legal continuum. The presence or exercise of "either" forecloses immediate free alienation of the leasehold by the Secretary, as we have seen, and while "either" obtains the lands are not open — but leased.

In final analysis, a lease terminates not necessarily on its anniversary but as a practical matter only when it ceases to be legally effective in any of its aspects. The Petrofina lease can only be said to have expired in all its aspects at 3:00 p.m. on November 2, for then only did all the rights that inherred in its ownership cease to be legally effective. This was the real end of the term and hence no notation was necessary in the tract book, and the land was properly subject to offers made after 3:00 p.m., November 2, 1959. The Graham offer was filed before then and should have been rejected.

When public domain land is leased under the Mineral Leasing Act of 1920, it is segregated so as to be not open to lease offers and any offer filed while the lease is in effect is considered invalid and rejected. See Joyce A. Cabot, et al., 63 I.D. 122 (1956), cited Appellee's brief, p. 9.

II

THAT APPELLANT'S LEASE OFFER WAS VALID

The appellant McGarry filed his lease offer on November 20, 1959. He was then and is now properly qualified to bid and appellee has at no time attacked his qualifications.

By the time appellant filed his bid, its only possible competition was Mrs. Graham's offer which has now been demonstrated to have been premature when filed and should have been considered invalid and rejected.

The Petrofina lease and all the bundle of rights that inherred in its ownership had terminated as a practical legally operative fact at 3:00 p.m. on November 2, 1959. After that there was no impediment to the Secretary's immediate power to accept a lease offer on the lands in question. As appellant's offer was the first filed after the lands became open for leasing, a lease should have been and ought now to be awarded him as a matter of legal right.

III

THAT ALL INDISPENSABLE PARTIES ARE BEFORE THE COURT

Appellee's point that Mrs. Graham is an indispensable party who should be joined herein is not supportable. That lady's lease offer being premature and invalid, she has never had any property rights.

Appellee's point was carefully considered by this Court recently in Barash v. Seaton, 103 U.S. App. D.C. 159, 163, 256 F.2d 714, 718 (1958), which quoted with approval Work v. Louisiana (1925), 269 U.S. 250, 254-255, 46 S.Ct. 92, 94, 70 L. Ed. 59, which holds that adverse lease claimants are not indispensable parties in actions of this sort.

If Mrs. Graham believes that she has interests which are not being adequately represented, she is free to intervene and assert her arguments.

Appellee suggests that Public Law 87-748, 76 Stat. 744, raises the question that the joinder requirements of all parties having an interest herein should be re-examined. In this matter suit was initiated, trial held and notice of appeal filed in this Court, all prior to the effective date of the said legislation. Appellant therefore contends its effect is academic as to this action.

CONCLUSION

The appellant's statutory right to an oil and gas lease has been clearly demonstrated and should be enforced by a decree of this Court reversing the trial court and ordering the appellee Secretary to issue the appellant the oil and gas lease to which he is entitled.

Respectfully submitted,

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